LIBRARY
SUPREME COURT. U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 167

TEXAS GAS TRANSMISSION CORPORATION, ET AL., PETITIONERS,

vs.

SHELL OIL COMPANY.

No. 170

FEDERAL POWER COMMISSION, PETITIONER,

vs.

SHELL OIL COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONS FOR CERTIORARI FILED JULY 1, 1959
CERTIORARI GRANTED OCTOBER 12, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 167

TEXAS GAS TRANSMISSION CORPORATION, ET AL., PETITIONERS,

vs.

SHELL OIL COMPANY.

No. 170

FEDERAL POWER COMMISSION, PETITIONER,

vs.

SHELL OIL COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Original	Print
Proceedings in the U.S.C.A. for the Third Circuit		
Petition to review and set aside order of the Federal Power Commission	A	1
Joint appendix consisting of proceedings before the Federal Power Commission	M	11
Excerpts from transcript of testimony	2	11
Testimony of E. S. Quinn—		
direct	2	12
cross	9	18

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JANUARY 14, 1960

	Original	Print
Joint appendix consisting of proceedings before the Federal Power Commission—Continued		
Excerpts from transcript of testimony—Continued		
Testimony of W. L. Bowser—		
direct	11	19
E. S. Quinn—		
(recalled)—		
cross	19	27
Exhibit No. 2—Letter dated October 11, 1954, from Shell Oil Company to Louisiana Natural Gas Corporation	29	35
Exhibit No. 4—Letter dated August 27, 1953 from Louisiana Natural Gas Corporation to The Atlantic Refining Company	30	36
Exhibit No. 5—Letter dated February 2, 1954 from B. F. Carr, Natural Gas Section to Louisiana Natural Gas Corporation with two pages of attachments	32	38
Exhibit No. 6—Averages of major pipe company prices in South Louisiana showing highest prices escalated over five years with escalation based on September 1 contract date	34	41
Exhibit No. 7—Prices of gas being sold in southwest Louisiana in similar quantities to those under Louisiana Natural Gas Corporation contract covering Atlantic Refining Company's properties in North Tepetate Field	35	43
Exhibit No. 9—Letter dated February 17, 1954 from The Atlantic Refining Company to Louisiana Natural Gas Corporation	37	46
Exhibit No. 10—Letter dated February 22, 1954 from Louisiana Natural Gas Corporation to The Atlantic Refining Company	38	47
Exhibit No. 11—Excerpts from letter dated March 31, 1954 from Louisiana Natural Gas Corporation to Shell Oil Company	39	48
Exhibit No. 12—Auditors' Confirmation letters received by and returned by Shell Oil Company	43	50

	Original	Print
Joint appendix consisting of proceedings before the Federal Power Commission—Continued		
Excerpts from transcript of testimony—Continued		
Item No. A—Shell Oil Company F.P.C. Gas Rate Schedule No. 153, for the sale of gas from Shell Oil Company to Louisiana Natural Gas Corporation, dated May 1, 1951	52	57
Item No. B—Supplement No. 1 to F.P.C. Gas Rate Schedule No. 153	70	72
Item No. C—Sample billing from Shell Oil Company to Louisiana Natural Gas Corporation, for gas sold and delivered during May, 1954	80	80
Item No. D—Billing from Louisiana Natural Gas Corporation to Shell Oil Company for the month of May, 1954	81	81
Item No. E—The Atlantic Refining Company F.P.C. Gas Rate Schedule No. 55, being the gas purchase agreement between Atlantic Refining Company and the Defense Plant Corporation, dated September 1, 1943, covering the sale of gas produced by Atlantic in the North Tepetate Field	81	81
Item No. F—Supplement No. 1 to Atlantic Refining Company Rate Schedule No. 55	99	96
Item No. G—Supplement No. 2 to Atlantic Refining Company Rate Schedule No. 55	102	99
Item No. H—Supplement No. 3 to Atlantic Refining Company Rate Schedule No. 55	109	105
Excerpts from Item No. J—Excerpts from contracts filed by Shell Oil Company with F.P.C. as Gas Rate Schedule which contain "Price" type Most Favored Nation provisions	110	106
Order accepting rate schedule for filing and providing for hearing	116	110
Decision, Presiding Examiner, Woodall, Docket No. G-12191, issued August 9, 1957	118	112
Order determining rate, Docket No. G-12191, issued November 12, 1957	133	126
Application for rehearing by Shell Oil Company	146	138
Order denying rehearing	153	143

	Original	Print
Joint appendix consisting of proceedings before the Federal Power Commission—Continued		
Letter dated January 6, 1955 from Leon M. Fuquay, Secretary, to Shell Oil Company	161	150
Exhibit "B"—Attached to contract dated as of May 1, 1951 between Louisiana Natural Gas Corporation and Shell Oil Company	163	152
Opinion, McLaughlin, J.	174	160
Judgment	180	165
Order denying petitions for rehearing	181	166
Clerk's certificate (omitted in printing)	182	166
Orders extending time to file petitions for writs of certiorari	183	167
Orders granting certiorari	187	168

[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12568

SHELL OIL COMPANY, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL POWER COMMISSION—Filed March 7, 1958

To the Honorable the United States Court of Appeals for the Third Circuit:

Shell Oil Company, herein called "Shell", petitions this Honorable Court to review and set aside a final order of the Federal Power Commission, herein called "the commission", issued November 12, 1957 (rehearing denied January 8, 1958) in a proceeding entitled *In the Matter of Shell Oil Company*, Docket No. G-12191.

1.

Nature of the Proceeding.

(a) Proceedings before the Commission.

This proceeding was instituted by the Commission for the purpose of determining Shell's legally effective price [fol. B] as of June 7, 1954[1] for natural gas produced in the Chalkley Field, Cameron Parish, Louisiana and sold by Shell to Louisiana Natural Gas Corporation, herein called

[1] The date as of which the Commission asserted jurisdiction over the rates of independent producers of natural gas following *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672.

"Louisiana Natural", under a gas sale contract dated May 1, 1951.[2] This contract is on file with the Commission as Shell's F. P. C. Gas Rate Schedule No. 153, and will be referred to herein sometimes as "the Shell contract".

Pursuant to the requirements of the Commission's Order 174-A as modified by order issued September 24, 1954 (19 Fed. Reg. 5081, 6301) requiring independent producers of natural gas to file with the Commission on or before December 1, 1954 their rates in effect on June 7, 1954, Shell filed with the Commission on November 18, 1954 the May 1, 1951 gas sales contract as its rate schedule.

As a part of its said rate schedule filing, and in addition to the contract itself, Shell filed two documents. One is a copy of credit statement from Louisiana Natural to Shell covering sales of gas for the month of May, 1954.[3] This statement reflects that payments as of that time were actually being made on the basis of the 8.9970 cent price. Shell concedes that that price was actually being paid on June 7, 1954. The other document which Shell filed was a form of sample billing prepared by Shell to evidence its position that the effective June 7, 1954 price was 12.5 cents per Mcf instead of 8.9970 cents per Mcf. Accordingly, this sample billing shows the price for the month of May, 1954 to be [fol. C] 12.5 cents per Mcf, plus gathering tax reimbursement, or a total of 13.5 cents per Mcf, for gas sold under the Shell contract. This billing statement contains the following notation:

> "We (Shell) claim the contract price is 12.5¢ per Mcf. (effective from September 1, 1953), but we have

---

[2] The contract was between Shell, as Seller, and Louisiana Natural, as Buyer. By merger in June, 1955, Texas Gas Transmission Corporation succeeded to all the rights and obligations of Louisiana Natural under the contract. The purchaser under this contract will sometimes be referred to as Louisiana Natural and sometimes as Texas Gas, depending upon which was the purchaser at the time of the event being discussed.

[3] The contract did not provide for Shell to bill the purchaser for gas sold. Instead the contract required, and the practice was, that the purchaser furnish Shell with monthly statements showing how much gas was delivered under the contract and the amount owing therefor to Shell.

received only 8.997¢ per Mcf. This matter is now under negotiation with purchaser."

On February 11, 1957 Shell filed, as Supplemental No. 1 to said rate schedule, an application for a rate increase from 12.5 cents per Mcf to 16.75 cents per Mcf, plus tax reimbursement.[4] In this filing, and pursuant to a previous request from the Commission, Shell explained the basis for its position that the legally effective rate on June 7, 1954 under its Rate Schedule No. 153 was 12.5 cents per Mcf, the basis being that the contract price had automatically increased to that figure prior to June 7, 1954, and Shell was legally entitled to the higher price notwithstanding that the purchaser was contending for and hence only paying the lower price.

By order issued on March 13, 1957 the Commission accepted the foregoing rate schedule for filing. In its said order, the Commission, recognizing that a dispute existed between Shell and Texas Gas as to the legally effective rate, fixed this matter for hearing for the purpose "of determining and fixing the rate properly effective on June 7, 1954 for the sale of gas by Shell Oil Company under its F. P. C. Gas Rate Schedule No. 153 to Texas Gas Transmission Company, and any other matters incident to such issue."

Texas Gas, present purchaser under the Shell contract, and Louisville Gas & Electric Company, a customer of Texas Gas, were permitted to intervene. A hearing was held on April 29, 1957, and these two intervenors, together with counsel representing the staff of the Commission, participated in that hearing.

[fol. D] On August 9, 1957 the Presiding Examiner, after having received briefs from all parties, issued a decision in favor of Shell finding that Shell's rate under its Rate Schedule No. 153, effective June 7, 1954, was 12.2 cents per Mcf at a pressure base of 15.025 pounds per square inch absolute, exclusive of severance and gathering taxes. When the Louisiana severance and gathering taxes are added to

[4] This price increase is not at issue here. It has been suspended and is pending before the Commission in another proceeding.

this amount it is 13.5 cents per Mcf.

Exceptions to the decision of the Presiding Examiner were filed with the Commission by staff counsel and by the intervenors, Texas Gas and Louisville Gas.

Shell filed with the Commission a motion for oral argument and for leave to file brief in support of the Presiding Examiner's decision.

On November 12, 1957 the Commission issued an order denying Shell's motion, reversing its Presiding Examiner, and finding:

> "The charge for natural gas by Shell under its F. P. C. Gas Rate Schedule No. 153 to Texas Gas, effective June 7, 1954, is 8.997 cents per Mcf at 15.025 psia excluding the one-cent gathering tax."

Shell timely filed an application for rehearing of the Commission's order. On January 8, 1958 the Commission denied rehearing.

The sole question involved is, what was the legally effective price on June 7, 1954 under the Shell contract?

(b) The Evidence.

The Shell contract of May 1, 1951 (Rate Schedule No. 153) contains the following favored-nation clause, around the meaning of which this proceeding centers:

> "If at any time after December 31, 1951, Buyer shall enter into a contract providing for the purchase by it of gas produced from a field or fields located, and delivered to Buyer, within a radius of fifty (50) miles of any point of delivery provided hereunder, Buyer shall forthwith notify Seller of such fact, and if the price per one thousand (1000) cubic feet at any time [fol. E] payable under such other contract is higher than the price payable hereunder, each price payable hereunder which is less than the price payable at the same time under such other contract shall be immediately increased so that it will equal the price payable under such other contract. In determining whether the price payable under such other contract is 'higher'

than the price payable for gas under this contract, due consideration shall be given to the provisions of this contract as compared with such other contract as to quality of gas, delivery pressures, gathering and compressing arrangements, quantity, provisions regarding measurement of gas, including deviation from Boyle's Law, taxes payable on or in respect of gas delivered and all other pertinent factors."

On September 1, 1943, Atlantic Refining Company, herein called "Atlantic", had entered into a contract for the sale of gas in the North Tepetate Field, Acadia Parish, Louisiana, to Defense Plant Corporation. The North Tepetate Field is located within a radius of 50 miles of the Chalkley Field. Louisiana Natural Gas Corporation (who was also the buyer under the Shell contract) succeeded to all the rights and obligations of the buyer under this Atlantic contract. This contract (referred to herein as "Atlantic contract") provided for a price for the first five years of 2.2¢ net per Mcf, and contains the following provisions (Art. III):

"(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.

"(c) During succeeding five-year periods, price to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.

[fol. F] "(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII."

ruary 17, 1954, Atlantic and Louisiana Natural, onged negotiations, entered into the following ntract:

ıder date of September 1, 1943, Defense Plant ›ration, as Buyer, entered into a gas purchase ıct with The Atlantic Refining Company, as , for the purchase of gas produced from Seller's in the North Tepetate pool of Acadia Parish, iana, which contract was subsequently amended ıary 16, 1949. Louisiana Natural Gas Corporation ased the pipe line operated by Defense Plant ›ration and the aforesaid contract with The At- Refining Company was assigned to Louisiana ral Gas Corporation.

accordance with Paragraph III of said contract, ıereby agreed that the price to be paid by Louisi- Natural Gas Corporation to The Atlantic Refining ›any for gas sold and delivered under such con- between September 1, 1953, and August 31, 1958, inclusive, shall be 12.2 cents net for each 1,000 feet at a pressure base of 15.025 p. s. i. a. of gas red at the central point or points set forth in the ıal contract, regardless of whether such gas is ered to a government plant or not; and, in addi- Buyer shall reimburse Seller for all state sever- taxes, or similar taxes, which Seller is obligated y and has paid to the State of Louisiana on such

hell's position that this contract of February 17, een Atlantic and Louisiana Natural activated the ation clause in the Shell contract and caused the he Shell contract to increase to 12.5¢, plus gather- ffective September 1, 1953.

2.

Jurisdiction of This Court.

›urt has jurisdiction of the subject-matter of this y virtue of Section 19(b) of the Natural Gas Act 831; 15 U. S. C. 717r(b)).

Shell was a party to the proceeding in which the Commission's Order of November 12, 1957 was issued. Shell has applied for a rehearing thereon which was denied on January 8, 1958. Said order, with the denial of rehearing, is a final order and Shell is aggrieved thereby. Each of the points hereinafter set forth upon which Shell relies was urged in its application for rehearing.

3.

Facts Upon Which Venue is Based.

Shell is a corporation organized and incorporated under the laws of the State of Delaware. Shell is, therefore, located within this circuit, and venue of this petition properly rests in this Court under the provisions of Section 19(b) of the Natural Gas Act (52 Stat. 831; 15 U. S. C. 717r(b)).

4.

Grounds on Which Relief is Sought.

The Commission reversed its Presiding Examiner and concluded that Shell's effective June 7, 1954 rate was 8.9970¢ rather than 12.5¢ per Mcf, thus finding that the Shell favored-nation clause had not been activated as a result of the February 17, 1954 contract between Louisiana Natural and Atlantic. The Commission's order is based upon two propositions. The first is that 8.9970¢ was the [fol. H] amount *actually being paid* on June 7, 1954, hence that is the legally effective rate no matter what the contract means nor what Shell was legally entitled to be paid thereunder. The second is that the contract which Louisiana Natural made with Atlantic on February 17, 1954, effective as of September 1, 1953, although entered into after the Shell contract and covering gas within the required 50-mile radius, was not a new contract for the purchase of gas but was merely action taken pursuant to a pre-existing contract, hence it did not meet the requirements of the Shell favored-nation clause.

Shell urges that the Commission was in error as to both propositions, and relies herein for relief upon the following grounds, each of which was urged in its application for rehearing filed with the Commission:

a. The Commission erred as a matter of law in concluding that the legally effective June 7, 1954 rate is to be determined solely by the amount of money actually being paid, rather than by the amount legally due under the contract. Thus the Commission erred in finding that the "effective rate on June 7, 1954 was 8.997 cents per Mcf at 15.025 psia excluding taxes, for that was the charge actually being collected from Texas Gas",[5] and erred in concluding "It clearly appears, therefore, that the price actually collected on June 7, 1954 is 8.997 cents, and this under our previous decisions is the effective rate as of that date and continues on from that date until changed in accordance with Section 4 of the Natural Gas Act and our Regulations."

b. The Commission's conclusion in disregarding contract rights, and in adopting "amount paid", rather than the amount legally due under the contract, as the sole criterion for determining the legally effective rate, is insupportable in reason, contrary to law and the Natural Gas Act, and is violative of the Fifth Amendment to the Constitution of [fol. 1] the United States in that it deprives Shell of its property without due process of law by impairing its contract right to receive for its property the price agreed to be paid therefor by the buyer, and arbitrarily substitutes the amount which the buyer saw fit to pay for the amount which the contract obligated the buyer to pay.

c. The Commission erred in determining "that the escalation clause in Shell's contract was not 'triggered' by Texas Gas' agreement with Atlantic for increased rates dated February 17, 1954", and in concluding that the 8.9970¢ rate was not escalated because "The agreement with Atlantic does not constitute a new contract as required by Shell's escalation clause, but merely represents action taken under a pre-existing contract between Texas Gas and Atlantic." These conclusions are contrary to law, not supported by any evidence, and conflict with uncontradicted evidence.

---

[5] The Commission, throughout its order, refers to the buyer under the Shell contract as Texas Gas rather than Louisiana Natural.

d. The Commission erred as a matter of law in concluding that Condition XII of the Atlantic contract (the arbitration provision) makes it clear that where the parties are unable to agree, arbitration of the price dispute is assured. The Commission also erred, as a matter of law and fact, in assuming that arbitration would assure a fixing of the price by the arbitrators.

e. The Commission erred in concluding that "paragraph (d) of the Atlantic contract provides for a definite method by which a price will be fixed in case the parties fail to agree". This conclusion is contrary to law.

f. The Commission erred as a matter of law in not holding this case to be governed solely by the law of Louisiana, the State in which the gas is produced, delivered and title passes. To the extent the Commission did look to the law of Louisiana, it committed legal error in not following and applying the clear provisions of that law as set forth in the Louisiana Civil Code, especially LSA-CC Article 2465.

g. The Commission erred legally in failing to consider Shell's alternative position that the favored-nation clause [fol. J] in the Shell contract is ambiguous and should be construed against the buyer who prepared it. In this regard the Commission failed to consider uncontradicted evidence showing the intended purpose of the clause.

h. In its order denying rehearing the Commission erred, in law and in fact, in concluding "In our opinion, Shell's rate being charged on June 7, 1954, by its own action was 8.997 cents, and was the effective rate."

i. The Commission erred in its denial of rehearing in construing the Atlantic price clause as one under which either party could have *forced* the price question to arbitration even in the absence of a disagreement between the parties prior to September 1, 1953. This conclusion is contrary to law and the plain wording of the contract.

j. In its denial of rehearing the Commission erred in concluding, apparently by assumption, that the existence of a contract right to submit the price question to arbitration, is sufficient unto itself to constitute a valid sale. In concluding that a "contract to determine the price by arbi-

tration" necessarily fixes a definite and certain price and thus meets the requirements of Louisiana law, the Commission disregards the clear meaning of the law of Louisiana, especially LSA-CC Article 2465.

k. In its denial of rehearing the Commission erred in giving weight to price provisions in other contracts not in issue here, and in disregarding positive evidence as to the meaning of the contract in issue.

l. The Commission erred in not affirming the decision of its Presiding Examiner and in not concluding that Shell's legally effective June 7, 1954 rate was 12.5 cents per Mcf, plus gathering tax. The conclusions so reached by the Commission are contrary to law and to the evidence.

[fol. K] 5.

Relief Prayed.

Shell prays that copies of this petition be served upon Respondent as required by law and the rules of this Court; that this Court review and set aside in its entirety the Order Determining Rate issued by the Commission in its Docket No. G-12191 on November 12, 1957. Shell further prays that this Court determine and enter judgment that Shell's legally effective June 7, 1954 rate under its F. P. C. Gas Rate Schedule No. 153 is 12.5 cents per Mcf, plus gathering tax, or, in the alternative, enter judgment setting aside said order of the Commission and remanding this proceeding with directions to the Commission that it enter an order finding that Shell's legally effective June 7, 1954 rate under its F. P. C. Gas Rate Schedule No. 153 is 12.5 cents per Mcf, plus gathering tax.

Respectfully submitted,

Oliver L. Stone, 50 West 50th Street, New York 20, N. Y., George C. Schoenberger, Jr., William W. Westerfield, Jr., Shell Building, New Orleans, La., By Oliver L. Stone.

Dated, New York, N. Y., March 4, 1958.

[fol. L] *Duly sworn to by Oliver L. Stone, jurat omitted in printing.*

[File endorsement omitted]

[fol. M]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,568

SHELL OIL COMPANY, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent,
TEXAS GAS TRANSMISSION CORPORATION, Intervenor,

and

LOUISVILLE GAS AND ELECTRIC COMPANY, Intervenor.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE
FEDERAL POWER COMMISSION

Joint Appendix—Filed September 26, 1958

[fol. 2]

PROCEEDINGS BEFORE FEDERAL POWER COMMISSION

Excerpts From Transcript of Testimony

Mr. Stone: I now ask there be identified as Item "C" by reference a sample billing from Shell Oil Company to Louisiana Natural Gas Corporation, for gas sold and delivered during May, 1954.

Mr. Becker: Mr. ——— excuse me.

Mr. Stone: This item was also—strike "also"—was filed with and made a part of the Shell F.P.C. rate schedule filed with the Commission in November, 1954.

Mr. Becker: Mr. Examiner, I believe there is a rather confused situation about this so-called sample billing. But in the first place, I would like to ask Mr. Stone if he is prepared to state whether this so-called sample billing was

at any time mailed to either Louisiana Natural Gas Company or Texas Gas Transmission Company, other than a possible mailing of that filing to which it was attached.

Mr. Stone: I am prepared to answer that question. Other than having furnished the purchaser with a copy of our rate schedule filing in November, 1954, that billing was not separately sent to the purchasers. That billing, in effect, represents a statement of the position of Shell Oil Company.

• • • • • • •

E. S. Quinn was called as a witness, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Stone:

Q. By whom are you employed?

A. Shell Oil Company.

Q. In what capacity?

A. Gas Contract Representative.

[fol. 3] Q. How long have you been in Shell's Gas Department?

A. 32 years.

Q. Are you familiar with the contract dated May 1, 1951, between Shell and Louisiana Natural Gas Corporation, covering the sale of gas in the Chalkley Field, Louisiana?

A. I am.

Q. Is that the same contract Shell filed as F.P.C. Gas Rate Schedule 153?

A. It is.

Q. Are you familiar with the terms of that contract?

A. Yes.

Q. Who negotiated that contract in behalf of Shell?

A. You might say 90 per cent of it was done by me. We had some other help, but very little. I was in on all of the discussions.

Q. Where were you located at that time?

A. Houston, Texas office.

Q. Did Shell then have an office in New Orleans, Louisiana?

A. Yes.

Q. Where was the office of Louisiana Natural Gas Company at that time; that is, from which they sent out negotiators?

A. Shreveport, Louisiana.

Q. Where did most of the negotiations on that contract take place?

A. In my office in Houston.

Q. By whom was the contract prepared?

A. It was prepared by the purchaser.

Q. That is, Louisiana Natural Gas?

A. Yes.

Q. And they presented it to you for acceptance?

A. Right.

Q. Where was that contract executed by Shell?

A. In Houston.

* * * * * * *

Q. Where is the gas located that is covered by this contract?

A. Chalkley Field, Cameron Parish, Louisiana.

[fol. 4] Q. Where is the delivery point under contract?

A. Central point in the field.

Q. It is in the field?

A. Yes. By that I mean a mutually agreed-upon central point.

Q. At any rate, the delivery point is in the Chalkley Field?

A. Yes.

* * * * * * *

By Mr. Stone:

Q. In the negotiations leading to the execution of this Shell-Louisiana Natural contract, what transpired relative to the price and particularly relative to the favored nations clause you have just identified?

A. Well, of course, I might say that the two foremost considerations in this thing were term—we were asked for a 20-year term, which we hadn't done before. And there came along with that, then, the price which would justify us in accepting a 20-year term at that time. At that time

it was quite impossible to predict what gas prices would be down the line. We were presented with this favored nation clause which we felt would protect us, at least would give to us the going price, the market price, as in years past in this operation.

We had no other way, actually, to justify a 20-year contract.

• • • • • • •

By Mr. Stone:

Q. What did you intend and understand that Shell Oil would accomplish by virtue of the favored nations clause in this contract?

Mr. Becker: I must renew objection to that question, Your Honor. That is completely incompetent under any rule of law.

[fol. 5] Mr. Weston: Staff Counsel agrees.

Mr. Stone: Again, we contend that the contract is unambiguous, also, the way we read it. We think we are entitled to the same price purchaser contracted to pay to the Atlantic Refining Company. This matter has been in dispute several years now between the parties. I submit there is uncertainty or ambiguity in this contract brought about by the position taken by the purchaser.

Presiding Examiner: Don't be too surprised, but for my understanding of it he has already answered the question. He hoped to keep up with the market price as it went along.

Mr. Stone: That is good enough for me, Mr. Examiner.

Presiding Examiner: That is what he said.

• • • • • • •

Presiding Examiner: I think you have said already—the key words here, "have the benefit of any higher price," you have already stated it. That is the very thing the man said, it was the purpose of this clause. And anybody that knows anything about the favored nations clause, that is what it had to mean.

• • • • • • •

Presiding Examiner: Who proposed this clause?

The Witness: Well, I might say—

Presiding Examiner: I am not sure the record is clear. He said something about it.

The Witness: It came about this way: We said if we could see the proper prices down the road, we were in position to make a trade. This was brought along as the [fol. 6] answer to that particular quandary we were in. So it was a part of the contract that was submitted to us.

Mr. Weston: There is a point unclear to me. Was it Texas Gas, or rather their predecessor, Louisiana Natural, who wanted the 20-year term, the extended term?

The Witness: Right.

Mr. Weston: And you believe this clause was exacted in consideration thereof?

The Witness: Yes, I believe so.

* * * * * * *

Mr. Stone: I was just getting to the point of establishing through this witness that the North Tepetate Field and the delivery point in that field from the Atlantic Refining Company to the Louisiana Natural Gas Company was within a 50-mile radius of the delivery point in the Chalkley Field under the Shell-Louisiana Natural contract.

Do I understand that counsel for Texas Gas will stipulate that that is a fact?

Mr. Becker: You are correct, sir. We shall so stipulate.

Mr. Stone: I ask that the record show the parties have stipulated that the delivery point under the Atlantic contract is within the 50-mile radius.

Presiding Examiner: All right, sir.

* * * * * * *

By Mr. Stone:

Q. Mr. Quinn, were you familiar, at the time you negotiated the Shell-Louisiana Natural contract at Chalkley, with the contract in the North Tepetate Field between the Atlantic Refining Company and the Louisiana Natural?

A. I might say I knew such contract existed, that thing was pretty well talked over when the line came in, the [fol. 7] Defense Plant Corporation line. We knew that there was a sale made from this field. We did not have a copy of the contract at the time.

Q. When and under what circumstances did you learn there had been a change in the price under the Atlantic contract in North Tepetate?

A. I don't remember exactly. I do remember that it came as a result of telephone conversation with some of the Atlantic people on some other matter. It just sort of built in there as a passing proposition. I picked it up as being one vital to us and we started work on it.

Q. Can you tell us approximately when you learned of that price?

A. It seems to me it was within 30 days after the signing of the agreement, say probably in March 1954. I don't know exactly.

Q. Then, what did you do after you learned of that new arrangement between Atlantic and Louisiana Natural?

A. Well, we passed the thing around through the company there as to what action should or would be taken. It seems to us that we had a new price coming up and we finally decided that the thing to do was to write a letter to Texas Gas and demand this extra payment.

Q. Did Shell write a letter to—you mentioned Texas Gas. But did Shell write a letter to Louisiana Natural Gas Corporation, relating to that matter?

A. They did.

* * * * * * *

By Mr. Stone:

Q. What happened, if anything, between Louisiana Natural and Shell after that letter was sent out?

A. Well, I know one thing that happened. I think there was some telephone conversation between R. L. Davis and Louisiana Gas. But the thing that I am familiar with is a [fol. 8] meeting we had in our office on this subject, on about February, following this letter.

Q. That would be February 1955?

A. Yes. I believe Mr. Rader and Mr. Stanton came down.

Q. They were from what company?

A. Louisiana Natural, or Texas Gas, whichever they at that time—I believe that was Louisiana Natural. Anyway, Mr. Stanton came down from the Houston office and Mr.

Rader came from the Owensboro office, and we had a meeting. At that time we discussed this thing and were informed that their position was that the favored nations clause had not been triggered and that that was final, as far as they were concerned.

We told them we were just as firmly convinced the other way, and that is the way the meeting ended.

Q. Were any other meetings or telephone calls or conferences held concerning that difference of opinion?

A. Well, I recall that we did say that we would later get together and discuss any new aspects of the situation. This was done, I would say, about sixty days, within that, after that first meeting. And Mr. Rader was there, and I believe Mr. Stanton. I am not sure.

Q. This was the second meeting after the letter?

A. That is right.

Q. Going back to the first meeting, which I think he said took place somewhere around February 1955, did the people attending in behalf of Louisiana Natural leave the matter open, or was it firmly closed at that meeting?

A. I would say that we had decided that we would again discuss the matter. So I guess it was left open.

Q. So then you did again discuss the matter in about—did you mention sixty days or so?

A. Yes.

Q. What came out of the second meeting?

A. There was no progress made on either side, I would [fol. 9] say. Texas Gas was just as firm as in the former meeting, and we were still of our same opinion. So there was nothing decided.

Q. What happened after that; do you know?

A. Well, the thing was turned over to our legal counsel, and that is about where it has been, as far as I know, ever since.

Q. Has Shell ever conceded the correctness of the position taken in those meetings by Louisiana Natural or Texas Gas, as the case might have been?

A. Never.

Q. Has Shell consistently adhered to its view that it was entitled to the higher price Atlantic was receiving at North Tepetate?

A. It has.

Q. How has the billing been handled under this contract between Shell and Louisiana Natural at Chalkley?

A. Well, by billing I imagine you mean that monthly statement?

Q. Billing or invoice or statement.

A. The purchaser issues a monthly statement from the Lake Charles office, and shows volumes, values, shows everything a statement should show, and then a check is later received in the same amount shown on the statement. We make no statements at all on our behalf. Because this is the type of contract where the purchaser does all the paper work in connection with settlement.

• • • • • • •

Cross examination.

By Mr. Weston:

Q. No, this is after you learned over the telephone—

A. I see.

Q. —of the possible activation, March, 1954, and before June 7, 1954.

A. I see.

Q. Were you aware, then, of any conversations with [fol. 10] Louisiana Natural concerning your belief that your contract had been activated, or are you aware of any conversation with Texas Gas before June 7, 1954, on this subject; that is to say, every month, March, April, May, June, 1954, you were receiving statements—.

A. Correct.

Q. And you were receiving checks. Did you do anything at that time to say "the amounts of these checks are not enough, the clause has been activated"?

A. We did not do that.

Q. Are you able to explain that in terms of where your offices are located or the people in charge of it not having knowledge, or do you have any idea as to why it took so long to get this underway?

A. Well, the people who received the money, that is the Treasury Department, make no demands of that nature

unless instructed to. We chose to take up this matter by letter, and not clutter up the files with a lot of statements until the thing was clarified. That is about all there was to that.

Q. Is this contract supervised from New Orleans?

A. Yes.

Q. Is the Treasury Department located in New Orleans?

A. Yes.

Q. And you have counsel at New Orleans?

A. Yes.

Q. But you were in the Houston Office?

A. No, I am in the New Orleans office now. I was in the Houston office at the time it was executed.

Presiding Examiner: Let me ask you this: You didn't realize how significant this June 7 date would be, did you, at that time?

The Witness: Not at that time, no, sir.

Presiding Examiner: Nobody else did, either.

* * * * * * *

[fol. 11] W. L. Bowser was called as a witness, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Stone:

Q. Mr. Bowser, by whom are you employed?

A. The Atlantic Refining Company.

Q. In what capacity?

A. Natural Gas Superintendent.

Q. How long have you been employed in the natural gas work of The Atlantic?

A. Since 1941.

Q. Are you familiar with the contract dated September 1, 1943, between The Atlantic Refining Company and Defense Plant Corporation in the North Tepetate Field, Louisiana?

A. I am.

Q. Did you have any part to do with the negotiating of that contract?

ome part of the negotiations.
re you generally familiar with the pricing provi-
f that contract?
enerally.
oes the contract contain an arbitration clause?
t does.

• • • • • • •

By Mr. Stone:

id this contract state a definite formula by which the
could be periodically ascertained, in your opinion?
No definite formula.
What happened under this contract at the end of its
year term; namely, August 31, 1948?
We renegotiated a price for approximately--the first
nths of the second 5-year period, approximately, with
se Plant Corporation, and specified that their succes-
2] sors would be the people we would negotiate for
st 4½ years.
I see. Then what happened when that interim price
ment terminated; I mean, do I understand that at the
the first five years you and Defense Plant Corpora-
hen reached an agreement fixing a price up to some-
n March, 1949?
Yes.
Then what happened at or about March, 1949, when
nterim agreement expired?
We renegotiated a new price. But I would have to
t the fil s to see if that was with D.P.C. or whether
iana Natural had taken over at that time.
If I might refresh your memory, the Supplement No.
ch is Item "F", in this record, shows an agreement
en Atlantic and War Assets Administration.
Oh.
Effective March 1, 1949. Is that the agreement to
you had reference?
Yes, sir.
What was the gist of that agreement?
It merely specified the price until September 1, 1953.

Q. As September 1, 1953 approached, did you receive any word from Louisiana Natural Gas Corporation with reference to that contract?

A. We got a letter from them saying they were ready to renegotiate the price under the contract.

* * * * * * *

By Mr. Stone:

Q. Exhibit 4, as you have mentioned, requested that Atlantic advise Louisiana Natural when and where they would like to open the negotiations. What happened between the two companies with respect to this matter after receipt of that letter?

A. Well, now, I am not going to try to tie it down to specific dates.

Q. All right.

A. We had several meetings, myself, Mr. Echols, Mr. [fol. 13] Carr and Mr. Marston, from Atlantic, participating in the various meetings. I believe Mr. Echols and I were possibly the only ones participating in all of them.

For Louisiana Natural there was a Mr. Adams, Mr. Mann, Mr. Hussey, and Mr. Morton, who participated, and in the—in the various meetings. I think Mr. Adams was the only one who attended all of the meetings.

Q. Mr. Adams is Mr. B. C. Adams, Jr., Vice President of Louisiana Natural?

A. That is right.

Q. And Mr. Mann is Mr. H. L. Mann, Vice President of Louisiana Natural?

A. He was at that time.

Q. Continue, please.

A. We discussed various and sundry parts of the contract, one of the items we discussed being this renegotiation provision, take provisions, and price. After quite a bit of discussion it didn't look like we were coming to a meeting of the minds on any of the other provisions of the contract, so that we finally settled on price only. They presented—

Q. When you say you finally settled on price only, you mean you finally settled on that as an issue of negotiation?

A. We didn't specifically rule out anything else. The only thing we came to a successful conclusion on was price.

Q. I see.

A. They presented some figures showing prices in southwest Louisiana and we presented some figures showing price in southwest Louisiana, that were markedly different. I would say the final series of meetings boiled down to negotiation as to where we were going to wind up between those two prices.

Q. In connection with those meetings, did you submit—excuse me. Did Atlantic submit to Louisiana Natural a breakdown of the prices as they consider it to be?

A. Yes. We sent them a tabulation showing prices in the southwest Louisiana area.

Q. I show you a document marked for identification Ex- [fol. 14] hibit 3, and ask you if that is the letter and the tabulation your company submitted to Louisiana Natural.

A. Yes, it is.

Mr. Stone: I offer in evidence as Exhibit No. 5 the document heretofore identified by that number and being a letter from B. F. Carr to Louisiana Natural Gas Corporation, dated February 2, 1954, attaching two pages of tabulation of prices.

Mr. Becker: No objection.

Presiding Examiner: It is admitted.

(The document above referred to, heretofore marked Exhibit No. 5, was received in evidence.)

By Mr. Stone:

Q. Did Louisiana Natural submit to you certain tabulations of prices which they found to prevail?

A. Yes.

Q. I show you a document which has been marked Exhibit 6, for identification, and ask you if that is the tabulation Louisiana Natural submitted to Atlantic.

A. Yes.

Q. I show you another document marked Exhibit No. 7, for identification, titled "Louisiana Natural Corporation",

and ask if that is also a tabulation of prices, buyers, sellers, and so forth, submitted to Atlantic by Louisiana Natural.

A. Yes sir.

Mr. Stone: We offer in evidence as Exhibit 6 the document previously so marked, styled "From Texas Gas, 2-8-54," being average of major pipeline company prices in south Louisiana, and so forth.

Mr. Becker: I have no objection. As I understand, then, both these papers were submitted by Texas Gas to Atlantic?

The Witness: Yes.

Mr. Stone: I also offer in evidence Exhibit No. 7.

[fol. 15] Mr. Becker: No objection.

Presiding Examiner: Six and 7 are admitted.

(The documents heretofore marked Exhibit Nos. 6 and 7, for identification, were received in evidence.)

• • • • • • •

By Mr. Stone:

Q. In the course of these negotiations, what price did Louisiana Natural contend should apply?

A. Well, they were talking about the 8.997 as being the price, whereas we—that was, in general, their position.

Q. From 8 to 9 cents?

A. Around 8.99 cents.

Q. A thousand?

A. Yes.

Q. How did they arrive at that figure?

A. The tabulation that they furnished indicated that there was a lot of gas moving at around that price. That was also their price in other contracts in the general vicinity.

Q. Did they take the position that prevailing prices, as used in the contract, mean the prices then being paid for gas which was under contract?

A. I don't know that I can say what position they took.

Q. I see. But they did come up with the 8.997 cents?

A. Yes.

Q. What price did Atlantic contend for?

A. We came up with the contention that the price we were talking about was prices that were being paid for gas

that was being bought and covering the period that we were negotiating for; in other words, if the contract was written in 1952 and provided prices in, say 1953 to 1958, those prices from '53 to '58 were the ones we used in arriving at our averages we were contending for.

Q. You would take the going contracts and look and include all of their price provisions, escalation and otherwise, [fol. 16] and see what they would be in this future 5-year period?

A. That was our position.

Q. That is, in general, how you arrived—

A. That is reflected in the table we prepared and sent to them.

Q. All right. What did you think was meant by the expression "prevailing prices in southwestern Louisiana?"

What do you think was meant by "southwestern Louisiana"?

A. We never did pin it down. We just took the best prices we could find in that general area. And they didn't draw any lines as to what was southwestern Louisiana. There are none specified in the contract.

Q. With reference to the expression "prevailing prices", did you feel bound by a price if there had been agreement upon it being the prevailing price?

A. Well, when you put that word "agreed" in there—in other words, the contract says that the two parties are going to agree. And if we agreed on a prevailing price, I think that would be it.

Q. Would a prevailing price necessitate agreement between the two of you?

Do you understand what I am trying to get at? I can explain the question a little further.

A. The thing I can't get around is that the contract says we are going to agree, we are going to make a survey of prevailing prices, and then agree on a price. And for purposes of the ensuing 5-year period, I don't think we would have had a prevailing price unless we had come to agreement on it. You see what I mean? I think both parties had to agree. And that was really the point of departure. We said one thing was the prevailing price and they said something else was.

Q. So, in other words, the contract did not specify a [fol. 17] definite formula under which you would determine "prevailing price"?

A. It did not.

Q. Perhaps you have answered this question, but what price was Atlantic contending for? Can I get that?

A. We were contending for, in the range of 16 cents. That is our—our tabulation will show.

Q. I see. And finally agreement was reached on 12.2, plus Louisiana gas severance tax, plus gathering tax?

A. That is right.

Q. How was that agreement reached; how did you finally come to agreement?

A. Well, I know we had a meeting, I know Ben Adams was there, myself and Mr. Marston and—well, we finally haggled back and forth and said—they said, "This is as high as we are going", and we said, "Well, we will see if we can get that agreed to." And discussed it with top management, reached an agreement, then drew the letter of agreement.

Q. Could you say you horse-traded it out?

A. Oh, yes.

Q. If you recall, how many meetings took place before you came to this final agreemeat?

A. I would hate to try to pin it down to a number. I know there were at least four, and there were numerous phone conversations.

Q. I see. And over what period of time did this take place?

A. It started about August and we finalized the thing about the middle of February, I believe it was.

Q. Would that be August, 1953?

A. Yes. It would be September—5½ months, roughly. Is that right, somebody?

Q. Then was the agreement reduced to writing?

A. Yes.

Q. Who prepared the writing evidencing the agreement between the parties?

A. I believe we prepared the first draft and sent it to them. They modified it and sent it back, we didn't like [fol. 18] their modification, so we modified it again and sent

it back, and that was the one finally executed. As far as I know, the two, the first draft and the draft they made have been destroyed, as far as I know. I know the copy they returned to us has been destroyed.

Q. I show you a document which has been marked as Exhibit No. 9, for identification, and ask you if that is the written contract which embodies the agreement entered into between Atlantic and Louisiana Natural.

A. It is.

Q. I notice the date on that at the top of the letter says February 17, 1954. And it is on the Atlantic Refining Company's stationery. So am I correct in assuming from that that Atlantic signed this document and mailed it to Louisiana Natural Gas Corporation in Shreveport, Louisiana, for their signature?

A. Yes, sir.

Q. At the lower left I notice it says "Agreed to and accepted this 22nd day of February, 1954, Louisiana Natural Gas Corporation, by H. L. Mann, Vice President."

Am I correct in assuming from that that Louisiana Natural accepted the contract in Louisiana and then returned it to you?

A. Yes.

Mr. Stone: We offer in evidence as Exhibit 9 the document previously marked—previously so identified, being document dated February 17, 1954, from the Atlantic Refining Company to Louisiana Natural Gas Corporation.

Mr. Becker: No objection.

Presiding Examiner: It is admitted.

(The document heretofore marked Exhibit No. 9, for identification, was received in evidence.)

By Mr. Stone:

Q. Did Louisiana Natural Gas Corporation return the executed document to you along with a letter of transmittal? [fol. 19] I say "to you." I mean, of course, to the Atlantic Refining Company.

A. I believe so, yes.

Q. I show you a document marked for identification Ex-

hibit 10, for identification, and ask if that is the letter of transmittal which accompanied the February 17, 1954 document, the latter being Exhibit 9.

A. Yes.

Mr. Stone: We offer in evidence as Exhibit No. 10 letter of transmittal from Louisiana Natural Gas Corporation to the Atlantic Refining Company, signed by H. L. Mann, Vice President.

Mr. Becker: No objection.

Presiding Examiner: It is admitted.

(The document above referred to was marked Exhibit No. 10 for identification and received in evidence.)

By Mr. Stone:

Q. Referring to Exhibit 10, it is signed by H. L. Mann, Vice President. Was he one of the representatives from Louisiana Natural Gas Corporation who took part in the negotiations?

A. He participated in some of the negotiations.

Q. But the price was agreed upon between the parties without reference to arbitration, was it not?

A. Oh, yes, that is right.

Q. You did not submit it to arbitration?

A. No, indeed.

• • • • • • •

E. S. Quinn was recalled as a witness, having been previously duly sworn, was examined and testified further as follows:

Mr. Becker: I would like to request that we mark a series of exhibits by reference. I think it can be given a single letter, Texas Gas "A". What it consists of is a list, with [fol. 20] copies, of contracts filed by Shell with the Federal Power Commission as gas rate schedules, containing price-type most favored nation provisions, and in each case I have indicated what the Shell F.P.C. gas rate schedule number is.

I request that be marked as Texas Gas Exhibit by refer-

ence No. "A", for identification. I am not offering it at this time.

Presiding Examiner: Let's get the identification letter. We have to keep this in sequence. So the next would be "J". And if you take the index to this list and simply go down the alphabet until you come to the end, if you do, then you can double "A", double "B", and go on down to the end. They will be so identified.

Mr. Becker: It will fall far short of that.

Mr. Stone: Is this now identified as Item "J"?

Presiding Examiner: Yes.

(The document above referred to was marked Item "J", for identification, by reference.)

Mr. Becker: These are copies of the documents on file. What I propose to do is call the attention of the witness to one of the paragraphs in here to get his understanding that that is a paragraph in a Shell contract. I could go through the entire list and do that with each one in here, but I think you have some guarantee of authenticity from the fact these are on file with the F.P.C., and I so certify.

Mr. Stone: Before you go into that, I want to object, but you might clarify the purpose of your offer. To begin with, I don't think this witness is qualified to go into that. Secondly, what is provided in some other contract not at issue in this case is neither pertinent nor material to this case. What Shell may have done or we may have received [fol. 21] when selling gas to somebody else under different circumstances, or where we may be buying gas—I don't know what this is, I haven't looked at it. I do want to make that objection, that these documents are not admissible and we object to their incorporation into this record by reference.

Therefore, I see no need to mark them at this time. Because what is said or done in another contract is not material nor relevant to the issue in this case.

• • • • • • •

Mr. Stone: Mr. Examiner, I made an objection at the outset that evidence concerning any other contracts is not

admissible in this case. I would like to reiterate that objection to this question and to similar questions.

Mr. Becker: I would like the privilege of attempting to qualify the exhibit.

Presiding Examiner: Well, the exhibit is entirely extraneous to any matter before the Examiner at this time. And it seems unnecessary to qualify an exhibit that pertains to a matter not under consideration.

Mr. Becker: Mr. Examiner, we have in this case a certain Shell contract which has specific language as to what shall happen with respect to a triggering of the price. Now, Shell is taking the position that this particular clause has a certain meaning, and I think it is very relevant and material that Shell has other clauses in its contracts for the sale of gas which are also favored nations clauses and which say in so many words that the events which Shell now claims triggered this contract shall trigger other contracts. But you will find, when you examine the clauses, the language is entirely different from the clause they are relying on. This is a case where Shell Oil Company has those contracts, and I think it is competent for us to show the difference in the language of the clauses and infer therefrom a difference in the meaning of what shall be [fol. 22] done thereunder.

Mr. Stone: I would like to say I am pleased to hear counsel recognize that there is ambiguity in the clause under the Shell contract. But I insist what was said or done in other contracts, we don't know who prepared them, circumstances under which negotiated, and what was provided for in other contracts is not relevant or material to the question before the Commission in this contract.

It is what does the Shell contract mean that is in issue here, not what some other contract means.

Mr. Becker: These are other equally unambiguous contracts and the difference is striking.

Mr. Stone: Our purpose here is to resolve and determine the ambiguity in this particular contract.

Mr. Weston: Mr. Examiner, this is a filed document with the Commission, of which this Commission can take notice to help them in determining a meaning for the specific contract in question, or specific filing in question.

Mr. Stone: I will agree with counsel that the Commission is certainly able to take notice of its own records. I don't agree that it is proper for the Commission to take notice of an irrelevant or immaterial document, even though it may be among the Commission's records.

Presiding Examiner: It should be done on a notice to all parties, and if it is ever done the way this is attempted to be done, if it is done at all. As far as taking notice, it is my view of the matter, and I think it is the generally accepted view, legally speaking, that the Commission must stay within the record. Some things it knows—can't help but know. It knows there are other forms of clauses. That is what counsel refers to. It can't help but take notice of that. And that isn't exactly taking notice. I am not trying to criticize the words. But the point is you can't get away [fol. 23] from the fact they do know there are other clauses. And they are refreshing their memory as to the kinds of clauses there are by looking at any papers they want to. But that is simply to utilize expert knowledge.

Mr. Weston: If there is a trade practice as to certain type of clause, then it is proper to have that trade practice in this record, as I see it.

Presiding Examiner: That is right. Frankly, it seems to me this is getting more complex than it needs to. I hate to see this whole group of things referred to. On the other hand, they are not burdening the record by being documents.

Later, of course, if there should be appeal to the courts, you gentlemen will have to agree on what is necessary to copy, and these things must be copied just as much as the others if they are deemed then relevant to the appeal. I don't see any objection.

Now, this all stems from a question that has been asked, and an objection. This is my view, that I see no objection to this witness being asked: "Is there some other clause?" Or even having it called to his attention there is some other clause, and say Shell has entered into contracts with a different kind of favored nation clause. That is all he is trying to prove.

Mr. Stone: I object to that, because what Shell has done in some other case, to me, is not relevant nor material. Hence not admissible in this case.

Presiding Examiner: I think it is relevant. I don't know how much weight it has. It depends on how it is hooked up. I can't exclude it merely because it has small weight. It has to be potentially without any weight before I can ignore its relevance.

Mr. Stone: It seems to me when two parties make a contract and specify one thing in it, and thereafter one of [fol. 24] those parties makes another contract under different situations with another person, and puts another clause in the other contract, to me that really has no bearing on ascertaining what the parties intended by the first contract.

Presiding Examiner: I don't think that is being done. I think what he is getting at is simply one basic question: Have there been other clauses in contracts in Shell's own contracting experience? That is all he is asking.

What is the question?

Mr. Becker: I will be glad to repeat it, Your Honor.

Presiding Examiner: All right.

By Mr. Becker:

Q. Will you look at the index to Exhibit No. "J" and will you tell me if any one of those contracts was negotiated by you?

Mr. Stone: The index doesn't show the page or anything, just refers to the rate schedule number; is that it?

Mr. Becker: Yes. I thought he might identify it by the index.

The Witness: Well, these company names mean something, but I will have to identify the field, in order to see if—

By Mr. Becker:

Q. Mr. Quinn, you have called my attention to a paper contained in this Exhibit "J", which is an agreement dated March 29, 1955, between Tennessee Gas Transmission Company and Shell Oil Company, which constitutes Shell's F.P.C. Gas Rate Schedule No. 130. And I call your attention to the first full paragraph on the second page of that contract and ask if you would read it.

A. "If at any time and from time to time after the date here of (sic) the cost per Mcf of gas purchased by buyer from any gas producer whomsoever in fields located in whole or in part within the contract area, shall be greater than the cost per Mcf of gas purchased hereunder, buyer [fol. 25] will increase the price per Mcf payable to seller for gas delivered hereunder currently as deliveries are made, and only during periods in which buyer is paying such greater cost to such other gas producer by an amount equal to the difference between highest cost per Mcf paid at the time by buyer to any such gas producer and the cost per Mcf payable hereunder."

Q. Now, Mr. Quinn, have you, in other contracts that you have negotiated on behalf of Shell Oil Company, used most favored nation clause substantially the same as that clause?

Mr. Stone: I object, Mr. Examiner. Counsel is trying to elicit now testimony as to just exactly what was done in other contracts. That is not relevant nor material here. The contract which we have before the Commission at this time is the law between the parties, not some contract made between other parties.

Mr. Becker: I think on cross-examination I should be permitted to ask him what he has done in negotiating contracts.

Mr. Stone: Not if it is not relevant to this proceeding, nor material.

Presiding Examiner: Well, I am not sure—I can't accept your objection. I would like to go along, try to show as reasonable a ground as possible, without seeming to argue. It seems to me relevant to know whether they have used one clause or several clauses. I think it is relevant, as something that casts light on the setting in which the controversy lies.

Mr. Stone: Here is the contract he is talking about, March 29, 1955.

Mr. Becker: I asked him whether substantially the same clause was used in other contracts they negotiated.

[fol. 26] Mr. Stone: But the contract you had the man quote from was in 1955. That only goes to emphasize to me the irrelevance of the evidence. It is irrelevant if he at-

tempts to introduce evidence of what they do even contemporaneously.

Presiding Examiner: I am going to let him answer. I think it is relevant to know if he has used similar clauses or other clauses, so he may answer.

* * * * * * *

Presiding Examiner: If these are incorporated by reference so that they may be examined as part of the record, haven't you proceed (sic) by admission of the company itself that they use other clauses?

Mr. Becker: I think I have, Your Honor. And I think I have gone far enough along this line in order to offer Exhibit "J".

Mr. Stone: Mr. Examiner, I would like to repeat my objection to the reception—

Presiding Examiner: I have your objection in mind. But I repeat, I think it is relevant as to whether or not there are different clauses used. If you stop and study the matter after you make such a record, you might find it to your advantage.

Mr. Stone: I noticed one in here that I do think is to my advantage. But I don't think the stuff ought to come in.

Presiding Examiner: I think other contracts throw some light on the contract (sic) of this one.

Mr. Stone: He hasn't shown these are all of the Shell [fol. 27] contracts that have been filed.

Mr. Becker: Your Honor, we tried to gather as many as we could. We weren't certain which ones this particular gentleman had negotiated.

Presiding Examiner: I am not very happy with as many as you have. I think your point is made with one or two, the point solely being that there are other types of first-party favored nation clauses.

Mr. Stone: All right, let it go.

Presiding Examiner: We are somewhat acquainted with these. We have had a few of them before.

Mr. Weston: From the Staff point of view, I would make this point, that there is no showing, certain, to date, of any trade practice in the formation of given categories

ses into which the present controversy will fit, or
ner controversy; however, this does throw at least
ght on the general subject.
iding Examiner: The situation in which the con-
on must take place.
Weston: Yes.
iding Examiner: While it doesn't necessarily tell
w to construe the words in the contract at issue here,
tell you you have to construe those words, not some
words, because there isn't any cut and dried pattern
fits into. That is why it is just as advantageous to
not more—
Stone: That is my point. I think all we have to do
rue the words of the Shell contract, and these others
othing to do with it.
I think Your Honor has made your position clear
t.

• • • • • •

] By Mr. Weston:

he length of time involved herein between the trig-
and the first notice that Texas Gas had seems to me
f some importance. Is that a customary length of
would you say, in your experience; does it take a
of six or eight or nine months for you to communi-
your buyers the fact that they owe you money? I
mind here you have a responsible buyer, no doubt
etting the money back, all that. And I am not trying
nate here any view on the thing, except I would like
why it took so long.
Well, I guess it did take quite a while for Shell to
p its mind to follow this thing through. We took
ime out for the Legal Department to look into this
As a matter of fact, we took some time among our-
before it was ever submitted to the Legal Depart-
took some time there for them to render a decision.
I say the time was a little bit longer than normal.
metimes things just simply go along slowly. It has
ed even in the preparation of contracts sometimes.

• • • • • • •

[fol. 29]

EXHIBIT No. 2

SHELL OIL COMPANY
NEW ORLEANS AREA
RICHARDS BUILDING
P. O. BOX 193
NEW ORLEANS 3, LOUISIANA

October 11, 1954

Subject: Gas Purchase Agreement between Louisiana Natural Gas Corporation and Shell Oil Company, Chalkley Field, Cameron Parish, Louisiana.

Louisiana Natural Gas Corporation
P. O. Box 1840
Petroleum Building
Shreveport, Louisiana

Gentlemen:

It is our understanding that you have recently entered into an agreement with The Atlantic Refining Company calling for a price of 12.2¢ (plus .3¢ reimbursement for severance taxes) per thousand cubic feet for gas produced from the North Tepetate Field in Acadia Parish, Louisiana. As you know, this field lies within 50 miles of the point of delivery for the gas which is being sold by Shell to Louisiana Natural under the Chalkley contract.

If our understanding of this matter is accurate, it would appear that under Subsection 3, Article VI of our Chalkley Field contract, you should have given us notice of the new agreement and also the benefit of the higher price. The fact that the recent agreement with Atlantic may have been a price renegotiation does not, in our judgment, prevent it from being a "contract" under the wording of Subsection 3. Likewise, we feel that the purposes of the [fol. 30] "favored nations" clause would be as well served in this situation as in any other.

Accordingly, our position is that under our agreement we are entitled to a price of 12.5¢ retroactive to September 1,

1953, the date we understand the higher price at North Tepetate became effective.

Please advise us as to the position your company intends to take in this matter.

Yours very truly,

/s/ R. L. Davis
R. L. Davis, *Manager*
Area Gas Department

Original Signed
By R. L. Davis

EXHIBIT No. 4

LOUISIANA NATURAL GAS CORPORATION
PETROLEUM BUILDING
P. O. BOX 1840
SHREVEPORT, LOUISIANA

August 27, 1953

Registered Return Receipt
The Atlantic Refining Company
Magnolia Building
P. O. Box 2819
Dallas, Texas

Attention: Mr. W. L. Bowser

Gentlemen:

Louisiana Natural Gas Corporation is purchasing gas from properties of the Atlantic Refining Company in the [fol. 31] North Tepetate Field, Acadia Parish, Louisiana under a contract dated September 1, 1943. That contract was amended under date of October 26, 1948 to increase the price and was again amended under date of February 16, 1949 to further increase the price and to change certain quantity provisions of the original contract. The price provisions of the above referred to amendments expire on August 31, 1953.

Paragraph (c) of Article III of the original contract provides for price redetermination for each five-year period. You are hereby notified of our willingness to commence negotiations with you concerning such price. It is requested that you advise us when and where you would like to open such negotiations.

Yours very truly,

LOUISIANA NATURAL GAS CORPORATION
By B. C. ADAMS, JR.
Vice President

BCAjr/s

[fol. 32]

EXHIBIT No. 5

February 2, 1954

File: AR-2798

Air Mail Special Delivery

Louisiana Natural Gas Corporation
Melrose Building
Houston, Texas

Attention: Mr. Ben C. Adams

Re: North Tepetate Field,
Acadia Parish, Louisiana

Gentlemen:

Pursuant to our last discussions, attached for your information are tables showing various average prices in Southwestern Louisiana.

Very truly yours,

B. F. CARR
Natural Gas Section

DDE/rmt
attachments

TABLE I

3 HIGHEST

	Transcontinental	Gulf-Interstate	United	Average
	(11/1)	(11/1)	(10/1)	
53-54	8.790	—	12.417	10.604
54-55	14.798	*16.000	13.417	14.664
55-56	16.000	16.333	14.417	15.583
56-57	16.000	16.733	15.417	16.050
57-58	16.000	17.133	+ 16.775	16.636

*10 mo. del. + 2 highest: 16 + 17.133 14.707 Average

[fol. 33]

TABLE II

4 HIGHEST

	Transcontinental	Gulf-Interstate	Interstate	United	Average
	(11/1)	(11/1)	(8/11)	(10/1)	
53-54	8.790	—	11.000	12.417	10.736
54-55	14.798	*16.000	11.000	13.417	13.708
55-56	16.000	16.333	11.000	14.417	14.438
56-57	16.000	16.733	11.696	15.417	14.962
			(11.000 to 1/1/57)		
57-58	16.000	17.133	12.000 min.	+16.775	15.477
		*10 mo. del.			13.864 Aver.
				+ 2 highest: 16 + 17.133	

TABLE III

4 HIGHEST + TEX.-NORTH (5 HIGHEST)

	Transcontinental	Tex-North	Gulf-Interstate	Interstate	United	Aver.
	(11/1)	(8/22)	(11/1)	(8/11)	(10/1)	
53-54	8.790	8.997	—	11.000	12.417	10.301
54-55	14.798	8.997	*16.000	11.000	13.417	12.734
55-56	16.000	9.019	16.333	11.000	14.417	13.354
56-57	16.000	9.897	16.733	11.696	15.417	13.949
				(11.000 to 1/1/57)		
57-58	16.000	9.897	17.133	12.000 (min.)	+ 16.775	14.361
			*10 mo. del.			12.940
					+ 2 highest: 16 = 17.133	

TABLE IV

3 LOWEST

	Tennessee Gas	Tex.-North	Trunkline	Aver.
	(11/1)	(8/22)		
53-54	8.322	8.997	8.46	8.593
54-55	9.072	8.997	8.63	8.900
55-56	9.222	9.019	8.81	9.017
56-57	9.222	9.897	8.99	9.370
57-58	9.222	9.897	9.17	9.430
				9.062

[fol. 34]

Exhibit No. 6

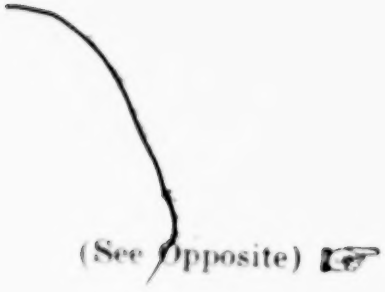


Exhibit No. 6

AVERAGES OF MAJOR PIPE COMPANY PRICES IN SOUTH LOUISIANA SHOWING HIGHEST PRICES ESCALATED OVER FIVE YEARS WITH ESCALATION BASED ON SEPTEMBER 1 CONTRACT DATE

Transco.	Gulf-Int.	United	Interst.	Tex No.	Tenn.	Trunk	Total	7 Cos. Ave.	Without Transco.	Without Transco. and Gulf-Int.
8,790	—	12,417	11,000	8,997	8,322	846	57,996	9,666	9,839	9,839
14,798	*16,000	13,417	11,000	8,977	9,072	863	—	11,599	11,048	10,223
16,000	16,333	14,417	11,000	9,019	9,222	881	84,801	12,114	11,467	10,494
16,000	16,733	15,417	11,696	9,897	9,222	899	87,955	12,565	11,993	11,044
16,000	17,133	16,775	12,000	9,897	9,222	917	90,917	12,988	12,341	11,413
							Ave.	11.786	11.338	10.603

* 10 Mos. (use number of months for Avg.)

BCA/c
2/3/54

[fol. 35]

Exhibit No. 7

(See Opposite) ☞

Exhibit No. 7

LOUISIANA NATURAL GAS CORPORATION

PRICES OF GAS BEING SOLD IN SOUTHWEST LOUISIANA IN SIMILAR QUANTITIES TO THOSE UNDER OUR CONTRACT COVERING ATLANTIC REFINING COMPANY'S PROPERTIES IN NORTH TEPETATE FIELD

Buyer/Seller	Field	Contract Price @ 15.025#.	Provisions Which Effect Price			Equivalent Price
			Taxes Paid By Buyer	Delivery Pressure	Dehydration	
TRUNKLINE GAS SUPPLY CO.						
Superior Oil Co.	Grand Lake Pecan Island Lakeside	8.45718¢	1.137¢	0	.225¢	9.81915¢
Grubb and Hawkins	Lakeside	8.45718¢	1.137¢	0	.225¢	9.81915¢
TRANS-CONTINENTAL GAS PIPELINE						
Union Oil of California La. Land & Exploration	Vinton West White Lake Tigre Lagoon Fresh Water Bayou East White Lake	8.79715¢	0	0	0	8.79715¢
Magnolia Petroleum Co.	West Gueydan	8.79715¢	0	0	0	8.79715¢
Sun Oil Co. & Sohio Petroleum	Egan	8.79715¢	0	0	0	8.79715¢
TENNESSEE GAS TRANSMISSION						
Sohio Petroleum Co.	Grand Chenier Hog Bayou Duson Iota	8.3222¢	1.3¢	0	0	9.6222¢
Atlantic Refining Co.	Bayou Sale	8.3222¢	1.3¢	0	0	9.6222¢
Marine Gathering Co.	Gulf of Mexico	8.3222¢	1.3¢	0	0	9.6222¢

Buyer/Seller	Field	Contract Price @ 15.025¢	Provisions Which Effect Price: Taxes Paid By Buyer	Delivery Pressure	Dehydration	Equivalent Price
UNITED GAS PIPELINE CO.						
Continental Oil Co.	Abbeville	8.0973¢	1.3¢	.25¢	.225¢*	9.8723¢
Magnolia Petroleum Co.	Mud Lake East Mud Lake Holly Beach Cameron Meadows	8.0973¢	1.3¢	0	.225¢	9.6223¢
UNITED GAS PIPE LINE CO.						
Continental Oil Co., et al.	St. Martinville	8.0973¢	.3¢	0	.225¢*	8.6223¢
Shell Oil Co.	Weeks Island, Iowa	8.9970¢	1¢	0	.225¢*	10.2220¢
Pure Oil Co. & Sun Oil Co.	Eugene Island Area	8.9970¢	1¢	—.25¢	0	9.4970¢**
TEXAS NORTHERN GAS CORP.						
Union Sulphur & Oil Corp.	Lewisburg South Bayou Mallet Church Point	8.9970¢	1¢	0	.25¢	10.2470¢
LOUISIANA NATURAL GAS CORP.						
Shell Oil Co.	Chalkley	8.9970¢	1¢	0	.225¢	10.2220¢
Hassie Hunt Trust	Maxie	8.9970¢	1¢	0	.25¢	10.2470¢
Union Sulphur & Oil Corp.	Choupique Gillis Roanoke South Roanoke Welsh Woodlawn Lake Arthur	8.9970¢	1¢	0	.25¢	10.2470¢

* Contract Summary in F.P.C. Docket silent on dehydration. United advises that Seller is required to dehydrate in only a few of their Southwest Louisiana contracts; therefore, it is assumed that obligation is on Buyer in these cases.

** This gas delivered on offshore platforms; hence, equivalent price reduced by .25¢/MCF, as gathering charge, in order that this price will be on comparable basis with others listed herein which are paid for gas delivered at central point on land.

[fol. 37]

EXHIBIT No. 9

THE ATLANTIC REFINING COMPANY
ATLANTIC BUILDING
DALLAS, TEXAS

February 17, 1954

Re: Our File: Contract AR-2798

Louisiana Natural Gas Corporation
P. O. Box 1840
Petroleum Building
Shreveport, Louisiana

Gentlemen:

Under date of September 1, 1943, Defense Plant Corporation, as Buyer, entered into a gas purchase contract with The Atlantic Refining Company, as Seller, for the purchase of gas produced from Seller's leases in the North Tepetate pool of Acadia Parish, Louisiana, which contract was subsequently amended February 16, 1949. Louisiana Natural Gas Corporation purchased the pipe line operated by Defense Plant Corporation and the aforesaid contract with The Atlantic Refining Company was assigned to Louisiana Natural Gas Corporation.

In accordance with Paragraph III of said contract, it is hereby agreed that the price to be paid by Louisiana Natural Gas Corporation to The Atlantic Refining Company for gas sold and delivered under such contract between September 1, 1953, and August 31, 1958, both inclusive, shall be 12.2 cents net for each 1,000 cubic feet at a pressure base of 15.025 psia of gas received at the central point or points set forth in the original contract, regardless of whether such gas is delivered to a government plant or not; and, in addition, Buyer shall reimburse Seller for [fol. 38] all state severance taxes, or similar taxes, which Seller is obligated to pay and has paid to the State of Louisiana on such gas.

Yours very truly,

THE ATLANTIC REFINING COMPANY

By /s/ J. N. MENDENHALL
General Manager of Domestic Crude Oil Production

AGREED to and ACCEPTED this
22nd day of February, 1954.

LOUISIANA NATURAL GAS CORPORATION

By /s/ H. L. MANN
Vice President

EXHIBIT No. 10

LOUISIANA NATURAL GAS CORPORATION
P. O. BOX 1840
SHREVEPORT, LOUISIANA

OPERATING OFFICE
PIONEER BUILDING
LAKE CHARLES, LA.

February 22, 1954

The Atlantic Refining Company
P. O. Box 2819
Dallas 1, Texas
Attention: Mr. Danny D. Echols

Gentlemen:

In accordance with your letter of February 19, we are enclosing two (2) executed copies of letter agreement dated February 17, 1954, covering the sale of gas, Acadia Parish, Louisiana.

[fol. 39] In accordance with your request, we are also returning your letter of February 12 together with four (4)

copies of the previous agreement. You will note that I had signed this agreement, but signature has been struck out.

Thanks very much for your cooperation.

Yours very truly,

/s/ H. L. MANN
H. L. Mann
Vice President

HLM:a
encls.

Received Feb. 23, 1954
Natural Gas Sect.

EXHIBIT No. 11 (Excerpts)

LOUISIANA NATURAL GAS CORPORATION
PIONEER BUILDING
P. O. BOX 1299
LAKE CHARLES, LOUISIANA

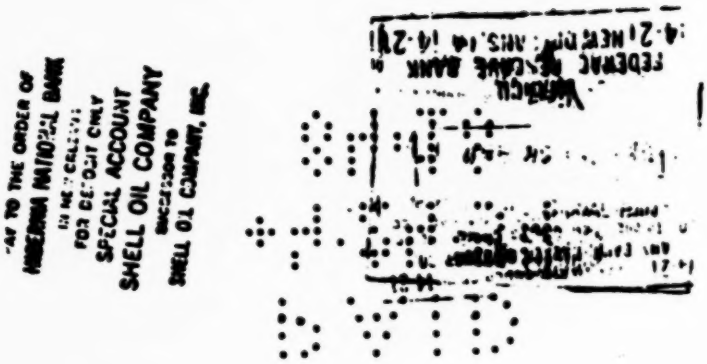
Date March 31, 1954

Shell Oil Company
P. O. Box 193
New Orleans, Louisiana

We credit your account as follows:

For gas purchased from Chalkley Field, Cameron Parish, Louisiana, during March, 1954.
Meter No. 4404, 418,843 M.C.F.
418,843 M.C.F. (15.025 psi) @ .089970 per M.C.F. $37,683.30

[fol. 41]



LOUISIANA NATURAL GAS CORPORATION
LAKE CHARLES, LOUISIANA

VOUCHER NO. 4-69
CHECK NO. 8086
DATE April 21, 1954

PAY TO THE ORDER OF

$ 37,483.30

Shell Oil Company
P. O. Box 193
New Orleans, Louisiana

LOUISIANA NATURAL GAS CORPORATION

E. C. Alexander

To CALCASIEU-MARINE NATIONAL BANK
LAKE CHARLES, LOUISIANA

[fol. 43] [In addition, Exhibit 11 contains 35 other sets of credit memoranda and checks for each month during the period from April 1954 through February 1957 which are substantially similar to the credit memorandum and check printed immediately above [R. 149-218].]

EXHIBIT No. 12

AUDITORS' CONFIRMATION LETTERS
SHELL OIL COMPANY
ARTHUR ANDERSEN & CO.

LOUISIANA NATURAL GAS CORPORATION
PIONEER BUILDING
P. O. BOX 1299
LAKE CHARLES, LOUISIANA

January 21, 1954

Shell Oil Company
Richards Building
New Orleans, Louisiana

Gentlemen:

Messrs. Arthur Andersen & Co., Independent Public Accountants, are now engaged in an audit of our accounts. In connection therewith, they desire to confirm the amount of our indebtedness to you at December 31, 1953, which was shown by our records as being $38,424.30.

Kindly state in the space below whether or not this is in agreement with your records as of December 31, 1953. If not, please furnish any information you may have which will assist the auditors in locating the difference.

[fol. 44] Your prompt attention to this request will be greatly appreciated. After signing the statement below, please mail direct to Arthur Andersen & Co., Railway Exchange Building, St. Louis 1, Missouri, in the enclosed envelope.

Yours very truly,

LOUISIANA NATURAL GAS CORPORATION

/s/ RICHARD C. YOUNG
Richard C. Young
Assistant Treasurer

RCY:jt

The above balance of $38,424.30 agrees with our records at December 31, 1953, with the following exceptions (if any):

— None —

Signed M. D. FYFE
Chief Accountant
Shell Oil Company

Date: January 28, 1954

LOUISIANA NATURAL GAS CORPORATION
PIONEER BUILDING
P. O. BOX 1299
LAKE CHARLES, LOUISIANA

August 10, 1954

Shell Oil Company
P. O. Box 193
New Orleans, Louisiana

Gentlemen:

Messrs. Arthur Andersen & Co., Independent Public Accountants, are now engaged in an audit of our accounts. [fol. 45] In connection therewith, they desire to confirm the amount of our indebtedness to you at June 30, 1954, which was shown by our records as being $37,273.94.

Kindly state in the space below whether or not this is in agreement with your records as of June 30, 1954. If not, please furnish any information you may have which will assist the auditors in locating the difference.

Your prompt attention to this request will be greatly appreciated. After signing the statement below, please

mail direct to Arthur Andersen & Co., Railway Exchange Building, St. Louis 1, Missouri, in the enclosed envelope.

Yours very truly,

LOUISIANA NATURAL GAS CORPORATION

E. C. ALEXANDER
Assistant Treasurer

ECA/ll

The above balance of $37,273.94 agrees with our records at June 30, 1954, with the following exceptions (if any):

None

Signed /s/ M. D. FYFE, *Chief Accountant*

By SHELL OIL COMPANY

Date

[fol. 46]

LOUISIANA NATURAL GAS CORPORATION
PIONEER BUILDING
P. O. BOX 1299
LAKE CHARLES, LOUISIANA

April 21, 1955

Shell Oil Company
P. O. Box 193
New Orleans, Louisiana

Gentlemen:

Our auditors, Arthur Andersen & Co., Railway Exchange Building, St. Louis 1, Missouri, are now engaged in an audit of our accounts. In connection therewith, they desire to confirm the amount of our indebtedness to you at March 31, 1955, which was shown by our records as being $41,403.92.

Kindly state in the space below whether or not this is in agreement with your records as of March 31, 1955. If not, please furnish any information you may have which will assist the auditors in locating the difference.

Your prompt attention to this request will be greatly appreciated. After signing the statement below, please mail direct to Arthur Andersen & Co., P. O. Box 185, Owensboro, Kentucky. A stamped addressed envelope is enclosed for your convenience.

Yours very truly,

LOUISIANA NATURAL GAS CORPORATION

/s/ V. W. MEYTHALER
V. W. Meythaler
Treasurer

VWM/bp
Enclosure

[fol. 47] The above balance of $41,403.92 agrees with our records at March 31, 1955, with the following exceptions (if any). Does not include $265,114.50 representing our claim for price increase of $.03503 on 7,568,213 MCF of gas sold from 9/1/53 through 3/31/55.

Date 4/27/55

Signed (Illegible)

By

LOUISIANA NATURAL GAS CORPORATION
PIONEER BUILDING
P. O. BOX 1299
LAKE CHARLES, LOUISIANA

February 2, 1955

Shell Oil Company
Box 193
New Orleans, Louisiana

Gentlemen:

Messrs. Arthur Andersen & Co., Independent Public Accountants, are now engaged in an audit of our accounts. In connection therewith, they desire to confirm the amount of our indebtedness to you at December 31, 1954, which was shown by our records as being $50,747.85.

Kindly state in the space below whether or not this is in agreement with your records as of December 31, 1954. If not, please furnish any information you may have which will assist the auditors in locating the difference.

Your prompt attention to this request will be greatly appreciated. After signing the statement below, please [fol. 48] mail direct to Arthur Andersen & Co., Railway Exchange Building, St. Louis 1, Missouri, in the enclosed envelope.

Yours very truly,

LOUISIANA NATURAL GAS CORPORATION

/s/ RICHARD C. YOUNG
Richard C. Young
Assistant Treasurer

RCY:tlb

The above balance of $50,747.85 agrees with our records at December 31, 1954, with the following exceptions (if any):

None

Signed /s/ M. D. FYFE, *Chief Accountant*

By

Date

TEXAS GAS TRANSMISSION CORPORATION
416 WEST THIRD STREET, OWENSBORO, KENTUCKY

Telephone: Owensboro 3-2431 Long Distance 206

January 23, 1956

Shell Oil Company
P. O. Box 193
New Orleans, Louisiana

Gentlemen:

In connection with an examination of our financial statements by Messrs. Arthur Andersen & Co., independent auditors, please confirm direct to them the amount of our indebtedness to you for gas purchases as of December 31, 1955, which according to our records was $47,369.48.

[fol. 49] Kindly indicate in the space provided below whether or not the above amount is in agreement with your records and return direct to Arthur Andersen & Co., Railway Exchange Building, St. Louis, Missouri, in the enclosed self-addressed envelope.

Yours very truly,

EDW. T. BOWERS
Comptroller

ETB/bp
Enclosure

Arthur Andersen & Co.:

The above amount of $47,369.48 agrees with our records as the amount due from Texas Gas Transmission Corporation for gas purchases as of December 31, 1955, with the following exceptions, if any

— None —

By /s/ E. B. VAN SAUN

TEXAS GAS TRANSMISSION CORPORATION
416 WEST THIRD STREET, OWENSBORO, KENTUCKY

Telephone: Owensboro 3-2431 Long Distance 206

January 28, 1957

Shell Oil Company
P. O. Box 193
New Orleans, Louisiana

Gentlemen:

Our auditors, Arthur Andersen & Co., Railway Exchange Building, St. Louis 1, Missouri, are now engaged in an [fol. 50] examination of our financial statements. In connection therewith, please confirm direct to them the amount of our indebtedness to you for gas purchases as of December 31, 1956, which according to our records was $55,889.03.

Kindly indicate in the space provided below whether or not the above amount is in agreement with your records and return direct to Arthur Andersen & Co., P. O. Box

185, Owensboro, Kentucky, in the enclosed self-addressed envelope.

Yours very truly,

/s/ Edw. T. Bowers
Edw. T. Bowers
Comptroller

ETB/hs
Enclosure

Arthur Andersen & Co.:

The above amount of $55,889.03 agrees with our records as the amount due from Texas Gas Transmission Corporation for gas purchases as of December 31, 1956, with the following exceptions, if any

— None —

Signed A. W. Green

By For E. B. Van Saun
Chief Accountant

[fol. 51]

TEXAS GAS TRANSMISSION CORPORATION
416 WEST THIRD STREET, OWENSBORO, KENTUCKY

Telephone: Owensboro Murray 3-2431 Long Distance 206

June 7, 1956

Shell Oil Company
P. O. Box 193
New Orleans, Louisiana

Gentlemen:

Our auditors, Arthur Andersen & Co., Railway Exchange Building, St. Louis 1, Missouri, are now engaged in an examination of our financial statements. In connection therewith, please confirm direct to them the amount of our indebtedness to you for gas purchases as of April 30, 1956, which according to our records was $35,761.77.

Kindly indicate in the space provided below whether or not the above amount is in agreement with your records and return direct to Arthur Andersen & Co., P. O. Box 185, Owensboro, Kentucky, in the enclosed self-addressed envelope.

Yours very truly,

EDW. T. BOWERS
Edw. T. Bowers
Comptroller

ETB/hs
Enclosure

Arthur Andersen & Co.:

The above amount of $35,761.77 agrees with our records as the amount due from Texas Gas Transmission Cor-
[fol. 52] poration for gas purchases as of April 30, 1956, with the following exceptions, if any

—None—

Signed E. B. VAN SAUN, *Chief Accountant*
Shell Oil Company
P. O. Box 193, New Orleans 3, La.

By

Date 6/18/56

ITEM NO. A BY REFERENCE

THIS CONTRACT, made and entered into as of May 1, 1951, by and between LOUISIANA NATURAL GAS CORPORATION, a Louisiana corporation, hereinafter referred to as "Buyer", and SHELL OIL COMPANY, a Delaware corporation, hereinafter referred to as "Seller",

WITNESSETH:

WHEREAS, under date of October 1, 1943, Shell Oil Company, Inc., entered into a contract for the sale of gas to Defense Plant Corporation from its properties in the Chalkley Field of Cameron Parish, Louisiana;

WHEREAS, Louisiana Natural Gas Corporation acquired the Lake Charles Natural Gas Pipeline System from Defense Plant Corporation, and the aforesaid contract for the sale of gas from Shell Oil Company, Inc., to Defense Plant Corporation was assigned to Louisiana Natural Gas Corporation;

WHEREAS, Shell Oil Company, a Delaware corporation, has succeeded to the rights of Shell Oil Company, Inc., under the above contract, and Shell Oil Company is now selling, and Louisiana Natural Gas Corporation is now purchasing, gas produced from the properties of Seller in the Chalkley Field of Cameron Parish, Louisiana, under [fol. 53] the terms of said contract, but Buyer and Seller now desire to rescind said contract and enter into a new contract for the purchase of gas produced by Seller from its leases in the Chalkley Field of Cameron Parish, Louisiana;

WHEREAS, Seller represents that it owns or controls valid and subsisting oil and gas leases and interests in the Chalkley Field of Cameron Parish, Louisiana, which are described in Exhibit "A" attached hereto and made a part hereof.

NOW, THEREFORE, in consideration of the premises and mutual covenants herein contained, the parties hereto do covenant and agree as follows:

ARTICLE I

Sale of Gas

1. Subject to all the terms, conditions and limitations hereinafter set forth, Seller hereby sells and agrees to sell and deliver to Buyer, and Buyer purchases and agrees to purchase and receive from Seller at the hereinafter described delivery point, merchantable gas in the quantities hereinafter set forth, produced from all wells now or hereinafter drilled on Seller's lands and leaseholds as described on Exhibit "A", attached hereto, and made a part hereof, in the Chalkley Field, Cameron Parish, Louisiana.

2. Any other provision of this contract to the contrary notwithstanding, Seller hereby expressly reserves unto

Seller, and Seller's successors and assigns, the following rights together with sufficient gas to satisfy such rights:

(a) The right to deliver to lessors of any of the leases included in the lands and leasehold estates or [fol. 54] included in any of the units described in Exhibit "A" sufficient gas to meet the requirements of lessee's obligations under such leases to furnish gas to such lessors.

(b) The right to use from said lands and leasehold estates, or any one or more of said leases or units at Seller's option, all such gas as Seller may need or require for development of Seller's properties situated within the same field, including but not limited to the use of gas for fuel, drilling, developing and operating said properties, for the production of oil, gas or other minerals.

(c) The right to operate the properties covered by this contract, free from any and all control by Buyer, in such manner as the Seller, in its sole discretion, deems advisable, including, without limitation, the right to drill new wells, to repair or rework old wells, to renew or extend, in whole or in part, the lands and leasehold estates or units covered by this contract and to abandon any well or surrender, release or terminate any lease not deemed by the Seller capable under normal methods of operation of producing gas in commercial quantities.

(d) The right to use from Seller's property, or any one or more of said leases or units, at Seller's option, all such gas as Seller may need or require for fuel for processing plants or for fuel for plants manufacturing petroleum products for the Seller (provided that such processing or other plants are located in the Chalkley Field, but whether or not the processing or [fol. 55] other plants are owned by others than the Seller) or for effecting delivery of gas to the Buyer, it being recognized by the Buyer that gas so used by the Seller and gas lost through process shrinkage or gathering operations is reserved to Seller.

(e) The right to process or to have processed for it gas produced from Seller's property or any one or more of said leases or units; provided, Seller agrees that thereby the gas will not be rendered incapable of meeting the quality specifications set forth in Exhibit "B" attached hereto.

(f) The right, as between Buyer and Seller, to retain and dispose of (free from any and all claims by Buyer) all right, title or claim to any and all liquids recovered by or for the Seller from the gas.

(g) The right from time to time to alter any gas unit included in the lands described in Exhibit "A" by increasing or decreasing the surface acreage contained therein, or to pool and combine any unit or any part of any unit with other properties owned by Seller or others, or to include in any unit any interest in the lands covered by such unit not theretofore included in such unit, or to add any lease or any part thereof to any unit, or remove any lease or any part thereof from any unit, or to make any other change in any unit deemed necessary by Seller, and in the event any such change or alteration is made in any unit, this contract shall continue to apply to the interest of Seller in the existing property included in Exhibit "A" as well as extend and apply to the interest of [fol. 56] Seller in the newly-formed unit to the extent that such interest is derived from the existing property described in Exhibit "A". Likewise Seller shall have the right from time to time to pool and combine any lease described in Exhibit "A", or any part thereof, with other properties owned by Seller or others, in which event this contract shall extend and apply to the interest of Seller in the newly-formed property to the extent that such interest is derived from the existing property described in Exhibit "A". Seller shall give notice in writing to Buyer of any change contemplated by this subparagraph (g) as is deemed material to this contract, and Exhibit "A" hereof shall be considered as having been amended accordingly.

Article II

Quantity of Gas

1. Subject to the provisions hereof, Seller agrees to sell and deliver to Buyer each day a "contract quantity" of twenty million (20,000,000) cubic feet of gas and Buyer shall be obligated to purchase and receive or pay for the following minimum quantities:

(a) During the period from May 1, 1951, to December 31, 1951, inclusive, Buyer shall be obligated to purchase and receive or pay for a minimum quantity of gas equal to fifty (50) percent of the "contract quantity" of gas which Buyer could have purchased during such period.

(b) After December 31, 1951, and during the remaining period of this contract Buyer shall be obligated to [fol. 57] purchase and receive or pay for a minimum quantity of gas equal to sixty-five (65) percent of the "contract quantity" of gas which Buyer could have purchased during such period;

During either of the periods provided in (a) or (b) hereof Seller agrees to sell and deliver to Buyer up to one hundred twenty-five (125) percent of the "contract quantity" on any day or days when so requested.

2. The Buyer will attempt to take gas from the Seller as nearly as practicable on a uniform daily and hourly basis.

3. If, during any such successive period of twelve (12) calendar months from the date of first delivery of gas under

Section 1(b) of this Article II, Buyer should fail to purchase and receive the minimum quantity of gas which Buyer is then obligated to purchase and receive hereunder, Seller having such volume available for delivery, then the Seller may thereafter reduce Seller's "contract quantity" delivery obligation to the average daily quantity which Buyer purchased and received from Seller during such

period, and Seller may sell to others than Buyer on a firm and exclusive basis and free from all the terms of this contract, gas in excess of the Seller's then existing maximum obligation hereunder. If under the foregoing circumstances the Seller shall reduce its "contract quantity" delivery obligation, the maximum and minimum quantities are to be reduced to one hundred twenty-five (125) percent and sixty-five (65) percent, respectively, of such reduced "contract quantity".

[fol. 58] Should the wells on the lands and leasehold estates described in Exhibit "A" be incapable, under normal methods of operation, of producing during any such twelve (12) month period the maximum quantity of gas which Seller is obligated to deliver hereunder, then the maximum amount of gas which the Seller is obligated to deliver may upon sixty (60) days notice to Seller by Buyer or to Buyer by Seller be reduced to the quantity of gas which such wells are capable of producing under normal methods of operation. If under the foregoing circumstances the maximum amount of gas which the Seller is obligated to deliver is reduced, the "contract quantity" shall be reduced to eighty (80) percent of such reduced maximum quantity, and the minimum quantity of gas which Buyer is obligated to purchase shall be sixty-five (65) percent of such reduced "contract quantity".

4. If during any twelve (12) successive months after the first delivery of gas under Section 1(b) of Article II, Buyer shall not purchase from Seller the maximum quantity of gas which may be produced from the reserves subject to this contract under normal methods of operation consistent with all applicable state conservation and proration laws and regulations and if the estimate of gas reserves, subject to this contract, as agreed upon by Buyer and Seller, or otherwise established by arbitration as provided in Article VIII hereof, shall be greater than one and one-half times the "contract quantity" of gas which Buyer may purchase under Section 1(b) of Article II during the remaining life of the initial term of the contract, Seller may (i) sell to others than Buyer all gas produced and not purchased by Buyer in excess of an amount required to

maintain the reserves subject to this contract during the remaining life of the initial term of the contract at not [fol. 59] less than the percentage set forth above and (ii) reduce the reserves subject to this contract to such percentage.

5. Buyer and Seller agree that a determination of the economically recoverable reserves, available for delivery under this contract, shall be made not later than October 1, 1951. Either Buyer or Seller may request not more often than once each calendar year that a redetermination of such reserves be made. If Buyer and Seller do not agree upon the quantity of such reserves then the matter shall be submitted to arbitration as provided in Article VIII. If at any time such reserves, as agreed upon or determined by arbitration, are less than the "contract quantity" of gas which Buyer may purchase under Section 1(b) of Article II during the remaining life of the initial term of the contract, then Buyer may reduce the "contract quantity" hereunder over the remaining life of the initial term of the contract to an amount which would deplete such reserves by the end of such initial period, the maximum and minimum quantities to be correspondingly reduced to one hundred twenty-five (125) percent and sixty-five (65) percent of such reduced "contract quantity".

6. Buyer shall pay Seller for all gas which it is obligated under the terms of this contract to purchase from Seller, Seller having such gas available for delivery to Buyer, or such portion of such gas as Buyer is obligated to purchase which Seller does have available for delivery, even though such gas shall not actually be taken by the Buyer. The right of Seller to payments under this Section 6 shall be in addition to all other rights and remedies which Seller may have under the circumstances.

[fol. 60] 7. For the purpose of reserve evaluation as provided in Section 5 of this Article II Seller agrees to furnish Buyer upon request all well logs, flow and pressure tests, casing programs, gas analyses and other pertinent information respecting gas reserves, gas quality and well

deliverability of the lands and leasehold estates subject to this contract. Seller agrees to furnish Buyer not more often than once each calendar year, any and all potential test and pressure data available to Seller.

Article III

Pressure Decline

1. The gas to be delivered hereunder shall be delivered by the Seller into the Buyer's pipeline at the pressure which Buyer shall from time to time specify which shall not be a pressure in excess of one thousand (1000) pounds per square inch gauge. If the natural pressure of any of Seller's wells shall become insufficient to deliver the gas into the Buyer's pipeline at the pressure which Buyer shall from time to time specify, either Seller or Buyer shall have the right, but shall be under no obligation, at its own expense to compress such gas to the pressure specified from time to time. In the event that neither elects to compress such gas, the gas not so compressed shall be released from the dedication under this contract within thirty (30) days notice from either party.

2. In the event the natural pressure of Seller's wells decline to a point at which the amount of gas which can be delivered at the pressure required by Buyer shall not be sufficient to render the maintenance and operation of Buyer's line serving these wells profitable, Buyer shall so notify Seller and unless within sixty (60) days after re- [fol. 61] ceipt of such notice Seller makes arrangements to compress sufficient gas at the pressure required by Buyer hereunder to render the maintenance and operation of Buyer's lines profitable, Buyer shall have the right to terminate this contract.

Article IV

Term of Contract

Subject to the other provisions hereof, this contract shall continue in full force and effect from this date until twenty (20) years after December 31, 1951, and from year to year

thereafter unless thereupon or until thereafter at the end of any such year canceled by either party giving the other party at least ninety (90) days advance written notice of cancellation.

Article V

Point of Delivery

The point of delivery shall be at a point within the field as mutually agreed upon by Buyer and Seller.

Article VI

Prices

1. The prices to be paid by Buyer for gas hereunder shall be as follows:

For all gas purchased from May 1, 1951, until January 1, 1952	7.64745¢ per 1000 cu. ft.
For all gas purchased from January 1, 1952, through December 31, 1956	8.9970¢ per 1000 cu. ft.
[fol. 62]	
For all gas purchased from January 1, 1957, through December 31, 1961	9.8967¢ per 1000 cu. ft.
For all gas purchased from January 1, 1962 through December 31, 1966	10.7964¢ per 1000 cu. ft.
For all gas purchased from January 1, 1967, through December 31, 1971	11.6961¢ per 1000 cu. ft.

2. Buyer agrees to pay in full the present gathering tax and any renewal or extension thereof, or any similar tax which may be levied upon such gas, up to and including the sum of one (1) cent per one thousand (1000) cubic feet at the pressure base at which such tax is now being computed. Any sales, transactions, occupation, service, production, severance, gathering, transmission, export or exercise tax assessment or fee hereafter levied, assessed

or fixed by the United States or any state or other governmental authority and taxes of a similar nature or equivalent in effect (not including income, excess profits, capital stock, franchise, or general property taxes) in addition to or greater than these being levied, assessed or fixed at the date of this contract in respect of or applicable to the gas to be sold by Seller to Buyer hereunder and which Seller may be liable for during any month, either directly or indirectly through any obligation to reimburse others, are hereinafter collectively referred to as an "additional tax". It is expressly understood and agreed between the parties that Buyer shall pay to Seller each month, so long as an "additional tax" shall be in effect and shall not exceed five (5) cents per one thousand (1000) cubic feet, an amount sufficient to reimburse Seller for seven-eighths (7/8) of such additional tax. In the event all or any part of such liability [fol. 63] of Seller is not determined or not determinable by the end of any month, then such additional amount per one thousand (1000) cubic feet required in respect to such liability not determined or determinable shall be set forth for all such months in any calendar year in a statement to be rendered by Seller to Buyer by April 1st of the following year and Buyer shall pay the amount due pursuant to such statement on or before May 1st of such following year. In the event that the "additional tax" shall exceed five (5) cents per one thousand (1000) cubic feet, Buyer shall pay to Seller each month, so long as the "additional tax" shall be in effect, an amount sufficient to reimburse Seller for seven-eighths (7/8) of such "additional tax" up to four and three-eighths (4.375) cents per one thousand (1000) cubic feet, and buyer and/or Seller may pay the excess over five (5) cents per one thousand (1000) cubic feet without obligation on the part of the other party to reimburse for any part thereof, and in the event that neither Buyer nor Seller agrees to pay such excess, this contract shall terminate three (3) months from the date such "additional tax" shall exceed five (5) cents per one thousand (1000) cubic feet.

3. If at any time after December 31, 1951, Buyer shall enter into a contract providing for the purchase by it of

gas produced from a field or fields located, and delivered to Buyer, within a radius of fifty (50) miles of any point of delivery provided hereunder, Buyer shall forthwith notify Seller of such fact, and if the price per one thousand (1000) cubic feet at any time payable under such other contract is higher than the price payable hereunder, each price payable hereunder which is less than the price payable at the same time under such other contract shall be immedi- [fol. 64] ately increased so that it will equal the price payable under such other contract. In determining whether the price payable under such other contract is "higher" than the price payable for gas under this contract, due consideration shall be given to the provisions of this contract as compared with such other contract as to quality of gas, delivery pressures, gathering and compressing arrangements, quantity, provisions regarding measurement of gas, including deviation from Boyle's Law, taxes payable on or in respect of gas delivered and all other pertinent factors.

4. Seller may request a price redetermination for the periods commencing January 1, 1962, and January 1, 1967, by written notice to Buyer given not less than six (6) months nor more than twelve (12) months prior to the beginning of the period for which redetermination is desired. Such determination is to be made by the parties or, if they are unable to agree, by the arbitrators, to be made and concluded not less than three (3) months prior to the beginning of such period. Upon such request, the parties, or the arbitrators, shall determine the three (3) highest prices to be paid during such period by operating interstate transporters of natural gas, including the Buyer, for gas purchased from fields in Cameron, Calcasieu, Jefferson Davis, Acadia, and Vermilion Parishes, Louisiana, under contracts with producers, under which deliveries of gas are being made at the time of agreement or arbitration, providing for deliveries of gas over a similar period of time and upon substantially the same terms of measurement, quality and delivery provided herein, and the prices to be paid during such period shall be the average of such three (3) highest prices per MCF; provided, that in no event shall the price per MCF hereunder be less, during the respective periods, than the price shown above for such period as those

[fol. 80]

ITEM NO. C BY REFERENCE

Received Nov 18 1954
Federal Power Commission

SHELL OIL COMPANY

Remit to

Box 193, New Orleans 3, La.

In Remitting Refer to

Date Invoice No.

To:

Louisiana Natural Gas Corp.
P. O. Box 1299
Pioneer Building
Lake Charles, Louisiana

We Charge Your Account As Follows:

For gas purchased during May, 1954, from leases in our Chalkley, Louisiana field:

Volume			
State Standard	Contract	Contract Price	
298,861	298,861	*.125	$37,357.62

* We claim the contract price is 12.5¢ per MCF (effective from September 1, 1953), but we have received only 8.997¢ per MCF. This matter is now under negotiation with purchaser.

[fol. 81]

ITEM NO. D BY REFERENCE

Received Nov 18 1954
Date May 31, 1954

LOUISIANA NATURAL GAS CORPORATION
P. O. BOX 1299
PIONEER BUILDING
LAKE CHARLES, LOUISIANA

Shell Oil Company
P. O. Box 193
New Orleans, Louisiana

We credit your account as follows:

For gas purchased from Chalkley Field, Cameron Parish, Louisiana, during May, 1954.

Meter No. 4404 298,861 M.C.F.

298,861 M.C.F. (15.025 psi) @ .089970 per M.C.F.

$ 26,888.52

ITEM E BY REFERENCE

GAS PURCHASE CONTRACT

THIS CONTRACT made and entered into as of this 1st day of September, 1943, by and between DEFENSE PLANT CORPORATION, a corporation created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended, hereinafter sometimes referred to as "BUYER," and THE ATLANTIC REFINING COMPANY, a Pennsylvania corporation, hereinafter sometimes referred to as "SELLER",

[fol. 82] WITNESSETH:

WHEREAS, Seller represents that it owns a full or part interest in certain wells producing gas in the North Tepetate Pool, Acadia Parish, Louisiana, and is also the owner of a full or part interest in valid oil and gas leases affecting lands in said Pool, and

WHEREAS, Buyer represents that it is constructing a gas transmission pipe line system which will extend to a point at or near the North Tepetate Pool, for the purpose of transporting gas to plants which have been or are being constructed in the vicinity of Lake Charles, Louisiana; the pipe line system to consist of a main line of varying diameters starting from a point near such plants with lateral or take-off lines extending to points of delivery, and Buyer proposes that said gas transmission pipe line system will be completed to such extent that it will be able to accept gas hereunder not later than April 1, 1944.

NOW, THEREFORE, in consideration of the premises and of the sum of One Dollar ($1.00) cash in hand paid to the Seller by the Buyer, the receipt for which is acknowledged, and in consideration of the mutual covenants and conditions hereinafter set forth, the Seller and the Buyer do hereby covenant and agree with each other as follows:

I.

The Seller agrees to sell and deliver to Buyer and Buyer agrees to buy and receive delivery of gas hereunder at an appropriate central point, selected by Seller and Buyer, in the North Tepetate Pool and located at or near the wells where gas is produced by Seller; and Seller agrees to reserve, for Buyer's requirements hereunder, its entire gas supply from the wells in the Pool herein mentioned, subject, however, to the following reservations and conditions:

[fol. 83] (a) Seller shall have the right to use gas for its own drilling and producing operations, including gas for fuel, gas lift, drilling, pumping, repressuring, cycling, recycling, and other normal or incidental operations either in the fields from which such gas is produced or other fields in which operations are conducted by Seller; but Seller's use of such gas shall be limited to an average of fifteen million (15,000,000) cubic feet per day during each calendar month. Seller shall at all times have the right to cycle produced gas to an underground reservoir in the same field so long as cycling operations, together with other uses of gas in Seller's operations, do not constitute a net

withdrawal of more than an average of fifteen million (15,000,000) cubic feet of gas per day during each calendar month.

(b) While Seller shall use all reasonable efforts to supply gas hereunder in sufficient quantities to meet Buyer's requirements, Seller will not be liable to Buyer for failure to so furnish gas except for failure to make reasonable efforts to maintain gas production from wells drilled by Seller and producing gas in said fields. Should Seller drill any new well or wells under its leases, and produce gas therefrom, such wells and the gas produced therefrom shall be subject to all the provisions of this contract. Seller shall not be required to produce gas from any wells in quantities sufficient to damage the well from which such production is obtained.

(c) Unless Buyer shall complete the construction of the gas transmission pipe line referred to above, to such extent that Buyer shall be able to accept delivery of gas hereunder, and shall commence the purchase of gas hereunder, not later than April 1, 1944, this agreement shall terminate and be of no further force and effect whatsoever; provided, that if Buyer shall be prevented from completing the construction of said line by April 1, 1944 by force majeure, [fol. 84] as defined in Condition XI hereof, then the conditional termination date shall be extended to June 1, 1944, so that unless Buyer so completes said line to such extent that Buyer commences the purchase of gas hereunder by June 1, 1944, this agreement shall wholly terminate, anything elsewhere herein contained to the contrary notwithstanding. In no event shall Buyer be liable to Seller in damages for failure to complete said line and commence the purchase of gas hereunder.

II.

Subject to the provisions of Condition I above, the Seller shall furnish and the Buyer shall accept delivery hereunder of gas in the following quantities and minimum amounts:

(a) Seller shall be obligated to furnish to Buyer hereunder approximately twenty per cent (20%) of Buyer's

total pipe line requirements which are presently estimated to be one hundred twenty-seven million (127,000,000) cubic feet per day, so long as Seller's wells in the North Tepetate Pool can produce that much gas during each calendar month's period. Buyer shall be obligated to take from Seller approximately twenty per cent (20%) of Buyer's total pipe line requirements, but not to exceed an average of twenty-five million (25,000,000) cubic feet per day during each calendar month's period, and only so long as Seller's wells in the North Tepetate Pool can produce that much gas during each calendar month's period. If, during any calendar month's period after the time gas is first delivered to Buyer hereunder, Seller should fail to make available to Buyer an average of twenty per cent (20%) of Buyer's total pipe line requirements, unless such failure is due to force majeure as defined in Condition XI, at any [fol. 85] time or times thereafter Buyer may secure the balance of its requirements under this contract from other parties; and once such default has occurred, Buyer may continue indefinitely to secure the balance of its requirements under this contract from other parties even though Seller's wells would have been capable of furnishing twenty per cent (20%) of Buyer's requirements.

Should Buyer continue so to secure the balance of its requirements elsewhere for more than three months after Seller shall have notified Buyer that Seller's wells are again capable of furnishing twenty per cent (20%) of Buyer's requirements, then thereafter Seller shall not be obligated to reserve such balance for Buyer, and may otherwise dispose of it, subject to Buyer's right to have first call on such balance of gas if necessary to enable Seller to continue to make delivery of the amount of gas Seller shall then be obligated to deliver to Buyer under this contract.

(b) If, during any twelve months' period after the time gas is first delivered to Buyer hereunder, the total amount of gas purchased by Buyer should average less than five million (5,000,000) cubic feet per day (and if, during said period, Seller's wells would have been capable of furnishing such minimum), either party shall have the right to

terminate this contract by giving the other party ninety (90) days' notice, in writing, of its desire so to do.

(c) If, during and over any three months' period, Seller should fail to make available to Buyer an average of as much as five million (5,000,000) cubic feet per day, Buyer shall have the option and right to cancel this contract by giving ninety (90) days' notice, in writing, of Buyer's desire so to do.

[fol. 86] (d) In the event of the cancellation of this contract by the written notice referred to in paragraph (b) or that mentioned in paragraph (c) above, this contract shall terminate at the end of ninety (90) days after the receipt of such notice except for necessary settlements between Seller and Buyer for gas delivered hereunder prior to said termination date, and except for any liability which may have arisen hereunder prior to such termination.

(e) If Buyer should purchase gas from any wells in the North Tepetate Pool other than wells covered by this agreement, Buyer agrees to purchase from such other wells not more than that proportionate part of Buyer's total takings from the North Tepetate Pool which the total gas allowable of such other wells bears to the total gas allowable of all producible wells in said Pool from which Buyer is then purchasing gas. If no gas allowable has been established for the North Tepetate Pool, then the foregoing ratio shall be based upon the gas producing capacity of said wells, as determined by the Department of Conservation of the State of Louisiana.

III.

The Buyer agrees to pay for the gas received hereunder a price computed as follows:

(a) For the first five years from the date of this contract, two and two-tenths cents (2.2c) net per one thousand (1,000) cubic feet of gas received at the central point or points herein provided for into Buyer's pipe line system, and in addition Buyer shall reimburse Seller for all state severance taxes, or similar taxes, which Seller is obligated to pay and has paid to the State of Louisiana for such gas.

[fol. 87] During the first five-year period, should any portion of the gas transported by Buyer through its main pipe line, as herein referred to, be sold directly or indirectly to any person, firm or corporation for use other than in a Government owned plant, or to other than a Governmental Agency, or Government owned plant or corporation, or should any portion thereof be used by any future owner of said line other than a Governmental Agency or Government owned plant or corporation, Seller shall receive for its proportionate part of such gas sold or used one-half cent (½c) per thousand cubic feet in addition to the net price of two and and two-tenths cents (2.2c) per thousand cubic feet hereinabove fixed (making a total net price of two and seven-tenths cents (2.7c) per thousand cubic feet); such increase to be based on the same percentage of the gas delivered by Seller to Buyer hereunder that the percentage of gas so sold to or used by private parties bears to the total amount of gas purchased from Seller and others and delivered through Buyer's transmission system during any one month's period, with proper allowance being made for losses in transit through Buyer's transmission line.

(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.

(c) During succeeding five-year periods, prices to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.

(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year [fol. 88] period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII.

IV.

For the purpose of measurement and billing under this contract, a standard of 1,000 cubic feet of gas shall be considered as the quantity of gas which occupies 1,000 cubic feet of space at a temperature of 60° Fahrenheit and at a pressure of 8 ounces above an assumed atmospheric pressure of 14.7 pounds per square inch. In computing the gas volumes correction shall be made for the flowing temperature and specific gravity of the gas and computations shall be made in accordance with the formulae and tables contained in the A.G.A. Report No. 2, except that no corrections shall be made for Reynolds number and expansion factor unless their combined effect shall amount to a correction of more than one per cent (1%).

Gas shall be delivered hereunder at natural flowing pressure of Seller's wells, and at pressures required by Buyer from time to time but not in excess of seven hundred fifty (750) pounds per square inch, and the minimum requirements as stated in Condition II hereof shall mean at these pressures.

V.

Buyer shall install, operate and maintain in accurate repair, at its own expense, at the various points of delivery, meters of ample capacity and type for accurate measurement of the gas supplied by Seller hereunder. Meters, meter readings and meter charts shall be accessible for inspection by Seller and Seller's agents and employees. Meters shall be calibrated at least once each thirty days at Buyer's expense. If, upon any test, the percentage of inaccuracy [fol. 89] shall be two per cent (2%) or more, registrations thereof shall be corrected at the rate of such inaccuracy for any period which is definitely known and agreed upon, but in case the period is not definitely known and agreed upon, then for a period extending back one-half of the time elapsed since the last calibration date. Following any test, metering equipment found inaccurate shall immediately be corrected or replaced by Buyer. If for any reason any meter is out of service or out of repair so that the amount of gas delivered can not be ascertained or computed from the reading thereof, gas delivered through the period such

meter was out of service or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

(a) By using the registration of Seller's check meter, if installed and accurately registering;

(b) By correcting the error, if the percentage of error is ascertainable by calibration, test or mathematical calculation;

(c) By estimating the quantity of the delivery by deliveries during the preceding periods under similar conditions when the meter was registering accurately.

Seller may, at its option and expense, install and operate check meters to check Buyer's meters, but measurement of gas for the purpose of this agreement shall be by Buyer's meters only, except in cases hereinabove specifically provided to the contrary. Check meters shall be of orifice type and shall be subject at all reasonable times to inspection or examination by Buyer, but the reading, calibration and [fol. 90] adjustment thereof and changing of charts shall be done only by Seller.

Either party shall have the right to be present at all calibrations or adjustments of the other party's meter.

VI.

Buyer shall install and maintain in repair recording thermometers at all meter installations and make proper temperature corrections in the gas volume computations, the average of the twenty-four (24) hour recording, or so much of the twenty-four (24) hours as gas has been passing, being deemed the temperature for that day. The specific gravity of the gas delivered shall be measured by an approved method at least every three months by joint tests on or as near the first of each three months' period as practicable and the results obtained shall be used in the gas volume computations until a new determination is made. The method of test shall be agreed upon by Buyer

and Seller. Such test shall determine the specific gravity to be used in computations for the measurement of natural gas delivered during such three months' period.

VII.

It is the intention of the parties that the gas to be delivered under this contract shall be gas which is produced in its natural state from Seller's wells. It is agreed that Seller shall install separators and/or drips at or near the mouth of its well or wells for the purpose of separating from the gas produced from said well or wells, any crude oil, casinghead gasoline, condensate, or other liquid crude petroleum which may be produced with the gas from the well or wells covered hereunder, or which may result from retrograde condensation or any other operation conducted [fol. 91] hereunder by Seller in producing the gas deliverable to Buyer. It is further agreed that Seller may operate said separators or drips in any manner which, in the sole opinion of Seller, Seller may deem necessary to its business of separating, recovering, or extracting such crude oil, condensate, or other liquid crude petroleum, so long as such operation does not interfere with the fulfillment by Seller of its agreements hereunder. All such crude oil, condensate, or other liquid crude petroleum separated, recovered, or extracted in said separators or drips installed by Seller, shall remain the property of Seller and Seller reserves the right to dispose of such crude oil, condensate, or other liquid crude petroleum in any manner it may choose.

It is understood and agreed, however, that Seller may extract, or cause to be extracted, the natural gasoline, butane, and other hydrocarbons from said gas before delivery to Buyer and Seller reserves the right, without the obligation, to construct a natural gasoline extraction plant for the purpose of extracting the natural gasoline, butane, and other hydrocarbons from gas to be delivered hereunder before delivering said gas to Buyer.

Buyer shall be obligated to accept and purchase only natural gas which is of merchantable quality, and which contains not more than twenty (20) grains of sulphur and twenty (20) grains of hydrogen sulphide per one thousand

(1,000) cubic feet, and which contains not more than one per cent (1%) by volume of free oxygen, and which has a heating content of not less than nine hundred fifty (950) British Thermal Units per cubic foot.

VIII.

Buyer shall render to Seller, on or before the 10th day of each month, a statement of the amount of gas delivered by Seller during the preceding calendar month and shall [fol. 92] accompany each statement with supporting charts, which charts shall be returned to Buyer after examination. Buyer shall make payment on or before the 25th day of each month for all gas delivered hereunder during the preceding calendar month. If failure to pay should continue for sixty (60) days, Seller may, upon ten (10) days' advance notice in writing to Buyer, suspend deliveries of gas hereunder, provided, however, Buyer shall not be considered to be in default hereunder if, in case of a bona fide dispute with respect to any portion of its bill, payment of the portion thereof not in dispute is made.

IX.

The Buyer shall use reasonable efforts to keep the Seller informed at all times in regard to current and anticipated demands for gas hereunder. The Seller hereby warrants the title to all gas delivered hereunder and its right to sell such gas, and that such gas is free and clear of all liens and adverse claims. The Seller further assumes the responsibility and liability of making payments to the lessors and royalty owners of proportionate amounts due them on the gas sold to the Buyer. Should Seller lose the right to deliver gas from any of its present leases by litigation or any other procedure except a voluntary relinquishment, Seller would not thereafter be liable for failure to deliver gas from such leases.

X.

The rights of the parties hereunder shall continue in force and effect for the gas producing life of the North

Tepetate Pool but in any event not to exceed twenty-five (25) years, unless sooner terminated by mutual consent or pursuant to the specific rights of termination herein elsewhere set forth.

[fol. 93]

XI.

In the event either party hereto is rendered unable, wholly or in part, by force majeure to carry out its obligations hereunder, other than its obligation to make payments of amounts due hereunder, it is agreed that upon such party giving notice and full particulars of such force majeure in writing or by telegram to the other party or parties affected as soon as possible after the occurrence of the cause relied on, then the obligations of the party giving such notice, so far as they are affected, shall be suspended during the continuance of such cause, but for no longer period; and such cause, so far as possible, shall be remedied with all reasonable dispatch.

The term "force majeure," as employed herein, shall mean acts of God, acts of a public enemy, injunction, strike, riot, invasion, fire, breakage of or accident to machinery or lines of pipe, inability to obtain, or unavoidable delay in obtaining, material and equipment, and any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming the suspension and which, by the exercise of due diligence, such party could not have avoided or overcome.

XII.

In case the parties hereto shall be unable to agree on any question or dispute arising under this contract, such question or dispute shall be referred for settlement to three arbitrators, one appointed by Seller, one appointed by Buyer, and the third appointed by the two others so chosen. The party desiring such arbitration shall notify the other and in such notice shall name an arbitrator, the arbitrator to be appointed by the other party shall be named within ten (10) days after receipt of such notice [fol. 94] of arbitration, and an additional arbitrator shall, within ten (10) days of the appointment of the second ar-

bitrator, be selected by the two (2) arbitrators theretofore appointed, but if one of said parties shall have failed to appoint an arbitrator within the time provided herein it is expressly understood and agreed that the two arbitrators shall arbitrate the question alone. If arbitrators shall have been appointed by the respective parties and shall have failed to select the third arbitrator within the above stated time, the third arbitrator shall be appointed by the senior Judge of the 5th Federal Judicial Circuit upon application therefor by either of said parties to the arbitration.

The matter in question or dispute shall be submitted in writing to the arbitrators immediately upon the completion of their appointment, and the parties shall do all things necessary to make proper submission thereof according to the character of the question or dispute involved, or as required by the arbitrators. The decision in writing signed by a majority of the arbitrators shall be final and conclusive with respect to the matter submitted and the parties hereto agree to accept and abide by the same. The cost of any arbitration hereunder shall be paid equally by all the parties, except that the compensation, if any, of the first and second members appointed to the board of arbitration shall be paid by the party by or for whom they are named.

XIII.

This contract may be assigned or transferred by Buyer, in whole or in part, to any assignee or transferee, without recourse. It is expressly understood that Seller shall not have the right to assign or transfer this contract without Buyer's consent, except to a subsidiary or an affiliate; and [fol. 95] Seller agrees that it will not assign this contract to any assignee, unless Seller shall also simultaneously assign or transfer its interest in wells producing gas in the North Tepetate Pool and its interests in oil and gas leases affecting lands in said Pool to Seller's assignee of this contract, and, likewise, this covenant to assign or transfer such interests in wells and leases simultaneously with this contract shall extend to any subsequent assignments by Seller's assigns of Seller's interest in the contract.

Subject to the provisions of the preceding paragraph, it is expressly understood and agreed that all the covenants,

stipulations, terms and conditions of this contract shall extend to and be biding upon the respective parties hereto, and their respective successors and assigns.

This contract shall apply to the entire gas production of all wells and leases in the North Tepetate Pool in which Seller now or hereafter has a full or part interest.

XIV.

This contract shall be subject to all applicable Federal, state, municipal and local laws, and to the rules, orders, regulations or requirements of any duly constituted Federal, state or other governmental agency or department having jurisdiction in the premises.

XV.

No member of or Delegate to the Congress of the United States of America shall be admitted to any share or part of this contract or to any benefit arising therefrom.

XVI.

Seller agrees to make available to Buyer for audit and inspection from time to time, its books and records per- [fol. 96] taining to severance taxes, or similar taxes, and matters in connection therewith. In the event that the increase in the net price of gas provided for in Condition III(a) becomes operative, Buyer agrees to make available to Seller for audit and inspection any records necessary for the computation of the increased net price.

XVII.

All notices and communications hereunder from either party to the other shall be in writing, and unless otherwise specified any such notices may be given by registered mail or delivery at the offices of the parties as follows:

Seller—The Atlantic Refining Company,
P. O. Box 2819,
Magnolia Building,
Dallas, Texas;

[fol. 65] prices may be subsequently adjusted in accordance with Section 3 of this Article VI.

5. Seller shall have the right but not the obligation to dehydrate the gas deliverable hereunder to Buyer's specification. Seller shall notify Buyer on or before May 1, 1951, whether or not Seller will so dehydrate such gas. In event Seller elects to dehydrate such gas, Buyer shall pay, in addition to the prices provided in Article VI, two hundred twenty-five thousandths (0.225) of one (1) cent per one thousand (1000) cubic feet of gas delivered hereunder.

Article VII

Warranty of Title to Gas

1. Seller hereby warrants title to the gas sold hereunder and the right of Seller to sell the same and the Seller warrants that all such gas is free from all liens and adverse claims, including liens to secure payment of production taxes, severance taxes and other taxes. Seller shall at all times have the obligation to make settlements for all royalties due and payments to the mineral and royalty owners under the Seller's leases as modified by such unitization agreements and other documents as may appear of record or otherwise be binding upon Seller, and in accordance with the terms of the respective leases, and to make settlements with all other persons having any interest in the gas sold hereunder, and Seller agrees to indemnify Buyer and save it harmless from all suits, actions, debts, accounts, damages, costs, losses, and expenses arising from or out of adverse claims of any or all persons to said gas or to royalties, taxes (other than taxes levied pursuant to statute against or payable by the Buyer), license fees or charges thereon which are applicable before the title to [fol. 66] the gas passed to Buyer or which may be levied and assessed upon the sale thereof to Buyer. In the event any adverse claim of any character whatsoever is asserted in respect to any of said gas, Buyer may retain, as security for the performance of Seller's obligations with respect to such claim under this section, out of monies then or thereafter payable to the Seller under this contract up

to the amount of such claim without interest until such claim has been finally determined or until Seller shall have furnished bond to Buyer in an amount and with sureties satisfactory to Buyer, conditioned for the protection of buyer with respect to such claim.

Article VIII

Arbitration

In case the parties hereto shall be unable to agree on any question or dispute arising under this contract, such question or dispute shall be referred for settlement to three arbitrators, one appointed by Seller, one appointed by Buyer, and the third appointed by the two others so chosen. The party desiring such arbitration shall notify the other and in such notice shall name an arbitrator, the arbitrator to be appointed by the other party shall be named within ten (10) days after receipt of such notice of arbitration, and an additional arbitrator shall, within ten (10) days of the appointment of the second arbitrator, be selected by the (2) arbitrators heretofore appointed, but if one of said parties shall have failed to appoint an arbitrator within the time provided herein, it is expressly understood and agreed that the sole arbitrator shall arbitrate the question alone. If arbitrators shall have been appointed by the respective parties and shall have failed to select the third arbitrator within the above stated time, the third arbitrator shall be appointed by the Senior Judge of the [fol. 67] 5th Federal Judicial Circuit upon application therefor by either of said parties to the arbitration.

The matter in question or dispute shall be submitted in writing to the arbitrators immediately upon the completion of their appointment, and the parties shall do all things necessary to make proper submission thereof according to the character of the question or dispute involved, or as required by the arbitrators. If the matter to be arbitrated is an accounting question the arbitrators shall be Accountants; if it is an engineering question the arbitrators shall be Engineers, etc., it being the intention of the parties that only personnel qualified as specialists in their field of work shall be used. The decision in writing signed by a

majority of the arbitrators shall be final and conclusive with respect to the matter submitted and the parties hereto agree to accept and abide by the same. The cost of any arbitration hereunder will be paid equally by all parties, except that the compensation, if any, of the first and second members appointed to the board of arbitration shall be paid by the party by or for whom they are named.

Article IX

Miscellaneous

1. (a) No waiver by either party of any one or more defaults by the other party in the performance of this contract shall operate or be construed as a waiver of any future default or defaults, whether of a like or a different character.

(b) Any notice, request, demand, statement or bill provided for in this contract shall be in writing and shall [fol. 68] be directed to the post office address of each of the parties hereto, as the case may be as follows:

Buyer: Louisiana Natural Gas Corporation
P. O. Box 1840
Shreveport, Louisiana

Seller: Shell Oil Company
Richards Building
New Orleans, Louisiana

or at such other address as either party shall from time to time designate for the purpose by a registered letter addressed to the other party.

2. This contract shall not be assigned, in whole or in part by the Buyer without, in each instance, the prior written permission of the Seller; except that the Buyer may, without first obtaining such written consent of the Seller, pledge or mortgage its interests in this contract, or assign the same as security for any loan to it, and Louisiana Natural may assign its interests in this contract at any time to Texas Gas Transmission Corporation.

All the Terms, covenants and agreements hereof shall run in favor of and be binding upon the parties hereto, their personal representatives, successors and assigns.

3. This contract may be executed in a number of counterparts, each of which shall be considered an original.

4. There is attached hereto Exhibit "B" which is hereby made a part of this contract and contains certain provisions entitled as follows:

I. Quality of Gas
II. Measurements
III. Billing and Payment
IV. Regulatory Bodies
V. Force Majeure

[fol. 69] In Witness Whereof, this instrument is executed as of the date first above written.

Louisiana Natural Gas Corporation

By B. C. Adams, Jr.
Vice President. (Buyer)

Attest:
R. C. Kester
Asst. Secretary (Buyer)

Witnesses:

Ann H. Neighbors
Mary B. Appleton

Shell Oil Company

By [Illegible]
Attorney-in-Fact (Seller)

Attest:

.....

Witnesses:

E. L. Clouts
F. K. Rader

[Exhibits A & B omitted]

[fol. 70]

ITEM NO. B BY REFERENCE

Received Feb 11 10:17 AM '57
Federal Power Commission

SHELL OIL COMPANY
50 WEST 50TH STREET
NEW YORK 20, N. Y.

February 7, 1957

FPC Gas Rate
Schedule No. 153
Supplement No. 1
Filing Date: 2-11-57

Effective Date: 8-22-57
Rates Effective
Subject to Refund

Secretary, Federal Power Commission
441 G Street Northwest
Washington 25, D. C.

Supplement No. 1 to Shell Oil Company Gas Rate Schedule—Chalkley Field, Cameron Parish, Louisiana

Dear Sir:

On November 18, 1954 Shell Oil Company filed the subject rate schedule (identified as Gas Rate Schedule No. 49 in attachment to letter dated September 30, 1954) covering sales of gas to Texas Gas Transmission Company.

Pursuant to section 154.94 of the Commission's Regulations under the Natural Gas Act, Shell files this change in rate for gas sold pursuant to the above rate schedule to increase the price, effective from date of filing hereof, but in no event later than March 11, 1957, from 12.5¢ per Mcf to 16.75¢ per Mcf, both rates exclusive of reimbursement for Louisiana gathering tax.

[fol. 71] This change in rate results from a price increase clause in the above rate schedule (Article VI, Par. 3, Pages 13 and 14), and the fact that on July 12, 1956 the purchaser in the above rate schedule (Texas Gas) entered into a contract with Gulf Refining Company providing for the pur-

chase by Texas Gas of gas within the 50-mile radius specified in the above rate schedule, at an initial price of 17¢ per Mcf. We understand that deliveries under the Gulf-Texas Gas Contract started on or about January 1, 1957.

Attached is a copy of letter from Texas Gas to us dated November 28, 1956 wherein we are notified of the foregoing purchase by Texas Gas from Gulf and of its application to our above gas sale. The contract between Gulf and Texas Gas is of record with the Commission in Docket No. G-10946, and said contract is incorporated herein by reference.

The date on which this filing is to be effective is February 8, 1957.

We request that the effective date of this change in rate be the date of filing, but in no event later than March 11 1957.

Attached is a 24-month comparative statement of sales and revenues, by months, under the effective rate of 12.5¢ per Mcf and under the proposed changed rate.

In support of this change in rate it is respectively shown:

1. This increase results from the bringing into effect of a provision in the above rate schedule (Article VI, Par. 3, Pages 13 and 14) which was agreed upon in a good faith, arm's-length transaction between the seller and the [fol. 72] buyer. The inclusion of this provision in the contract was a major inducement for Shell to enter into this long-term contract to replace a contract made some years earlier.

2. The increased price represents the current fair value of the gas committed to this long-term contract, and said increased price is in line with or lower than prices currently being paid for gas from comparable reserves in South and Southwest Louisiana.

3. The increased price is necessary as a partial offset to the increase in the cost of our gas business. In recent years the cost of exploring for gas reserves, acquiring gas leasehold rights, and drilling for and producing gas have undergone substantial increases. For example, basic wage rates alone have increased on the average of 4 to 5% annually since this contract was negotiated.

In connection with this change in rate, it is further shown:

With its letter of September 30, 1954, Shell filed with the Commission the above rate schedule which consists of a gas sales contract dated May 1, 1951 between Shell, as Seller, and Louisiana Natural Gas Corporation (now Texas Gas Transmission Company, and referred to herein as Texas Gas), as Buyer. As a part of that filing there was included a billing statement showing the price as of June 7, 1954 to be 12.5¢ per Mcf, but states that we were being paid only 8.997¢ per Mcf and that the matter was under negotiation with the purchaser.

In your letter to us of January 6, 1955 you ask that we furnish you with a statement of the basis for the 12.5¢ price.

This matter has been delayed as we have been attempting, but without success, to have Texas Gas agree with [fol. 73] us as to the legal effect of the following provision of the subject rate schedule (Article VI, Paragraph 3, pages 13 and 14), in the light of events which transpired prior to June 7, 1954:

> "If at any time after December 31, 1951, Buyer shall enter into a contract providing for the purchase by it of gas produced from a field or fields located, and delivered to Buyer, within a radius of fifty (50) miles of any point of delivery provided hereunder, Buyer shall forthwith notify Seller of such fact, and if the price per one thousand (1,000) cubic feet at any time payable under such other contract is higher than the price payable hereunder, each price payable hereunder which is less than the price payable at the same time under such other contract shall be immediately increased so that it will equal the price payable under such other contract."

On February 17, 1954, pursuant to a price negotiation provision in a contract between Texas Gas and Atlantic Refining Company dated September 1, 1943, Texas Gas and Atlantic entered into a contract pursuant to which Texas Gas paid Atlantic 12.5¢ per Mcf effective from September 1, 1953 for gas produced in the North Tepetate Field, which

field is located within the fifty-mile radius specified in our contract of May 1, 1951 with Texas Gas.

As a result of the foregoing contract between Texas Gas and Atlantic dated February 17, 1954, Shell has consistently maintained with Texas Gas that the price in our subject rate schedule automatically increased on February 17, 1954 to 12.5¢ per Mcf effective September 1, 1953 (the effective date of the price contract between Texas Gas and Atlantic). Accordingly, the June 7, 1954 price under the subject rate schedule was 12.5¢ per Mcf.

[fol. 74] Texas Gas does not agree with us that the contract which it made with Atlantic on February 17, 1954 activated the above-quoted price clause in the subject rate schedule. By virtue of this disagreement we are now preparing to file suit against Texas Gas in a court of proper jurisdiction to confirm our position that our rate as of September 1, 1953 (and, of course, our June 7, 1954 rate) is 12.5¢ per Mcf.

• • • • • • •

In the event the Commission deems it necessary to enter upon a hearing concerning this increase, it is respectfully requested that the increase not be suspended, but be permitted to go into effect as of the date of filing hereof, but in no event later than March 11, 1957, under bond and subject to refund. The reasons for this request are:

At the time this long-term contract was entered into in 1951, the Commission was not asserting jurisdiction over field sales of gas by producers. We had no reason at that time to believe that contractual price provisions would not be carried out as written, hence, little or no consideration was given by us to devising a contractual arrangement under which we would be afforded the opportunity, by an anticipatory filing, of protecting ourselves against loss of revenue which might result from a suspension of a price increase.

Shell was compelled by circumstances to commit this gas under this contract pursuant to which the new price now sought to be made effective could not be put into effect until the occurrence of a specified event which Shell could neither control nor anticipate. In view of these circumstances, we are contractually bound to a situation

where a suspension will make us suffer unnecessary and irretrievable loss of revenue in the event our increased price is later determined to be just and reasonable.

[fol. 75] The situation now existing in the natural gas industry relative to the increase of rates in existing contracts results in a disparity of treatment between producer natural-gas companies and pipe line natural-gas companies. This disparity of treatment, while legally permissible because of the different contractual arrangements under which the producers and the pipe lines normally sell their gas, is nonetheless unnecessary and results in the inequitable treatment to the producers. We submit that it would be an appropriate exercise of Commission discretion to eliminate such disparity which has been brought about by circumstances beyond the control of the Commission and the producers.

We realize, of course, that this contract was of our own making and that we are bound by its provisions. And certainly we recognize the unfettered power of the Commission to suspend this increase for a period not to exceed five months. But we submit that the public interest cannot be adversely affected and Shell can receive no more than its just entitlement by permitting this increase to go into effect, as herein requested.

If a hearing is deemed necessary and such hearing results in a finding that the increased price is not just and reasonable no one will suffer. Shell will then be obligated and able to reimburse the purchaser with interest. If, on the other hand, a hearing results in a finding that the increased price is just and reasonable we will then only receive, and the purchaser will then only be obligated to pay, a price which they agreed upon and which the law entitles the seller to receive.

It is therefore respectfully submitted that the price increase filed for herein is just and reasonable and should [fol. 76] be permitted to go into effect on the date of filing hereof, but in no event later than March 11, 1957.

In the alternative, an in the event the Commission deems it necessary to enter upon a hearing relative to this increase, it is respectfully urged that said increase not be suspended but that Shell be permitted to collect same from

and including the date of filing hereof, but in no event later than March 11, 1957, upon furnishing acceptable bond of corporate undertaking conditioned upon the refund, with interest, of so much of such increase as the Commission determines in a final order to exceed the just and reasonable price of the gas being sold under above rate schedule.

A copy of this filing is being sent to Texas Gas Transmission Company.

Yours very truly,

/s/ W. B. Golush
W. B. Golush, *Manager*
Head Office Gas Department

[fol. 77]
STATE OF NEW YORK
COUNTY OF NEW YORK

W. B. Golush, being first duly sworn, deposes and says that he is Manager, Head Office Gas Department of Shell Oil Company and that he is authorized to make the foregoing filing; and that the contents of said filing are true and correct to the best of his knowledge, information and belief.

/s/ W. B. Golush
W. B. Golush

Sworn to and subscribed before me this 7th day of February, 1957.

(SEAL) /s/ Eileen M. Pineman
Notary Public

Eileen M. Pineman
Notary Public, State of New York
No. 30-8376610
Qualified in Nassau County
Cert. filed in New York County
Commission expires Mar. 30, 1958

[fol. 78]

Received Feb 11 10:17 AM '57
Federal Power Commission

TEXAS GAS TRANSMISSION CORPORATION
638 BANK OF THE SOUTHWEST BUILDING
HOUSTON 2, TEXAS

November 28, 1956

Telephone CApitol 7-6321
Teletype HO-894

Address Reply to:
Gas Supply Department

Shell Oil Company
P. O. Box 193
New Orleans, Louisiana
Attention: Mr. E. S. Quinn

Gentlemen:

Referring to Article VI, Section 3, of our gas purchase contract dated May 1, 1951, covering certain of your properties in the Chalkley Field, Cameron Parish, Louisiana, we enclose herewith for your information a copy of a gas purchase contract dated July 12, 1956, between Gulf Refining Company and Texas Gas Transmission Corporation.

Certificates of Public Convenience and Necessity were issued by the Federal Power Commission on November 26, 1956, to Texas Gas in Docket No. G-10886 and to Gulf Refining in Docket No. G-10946.

It is anticipated that initial deliveries of gas pursuant to the terms of this contract will commence on or about January 1, 1957.

Yours very truly,

TEXAS GAS TRANSMISSION CORPORATION

WLS:bb
Enclosure

W. L. STANTON,
W. L. Stanton, *Vice President*

SHELL OIL COMPANY
COMPARATIVE STATEMENT OF GAS SALES
FOR 12 MONTHS PRECEDING AND 12 MONTHS FOLLOWING 1/1/57

SELLER: Shell Oil Company BUYER: Texas Gas Transmission Corp. FIELD: Chalkley, Cameron Parish, La.

Period	MCF (15.025 FPV)	Price "A"*	Value "A"	Price "B"*	Value "B"	Period	MCF (15.025 FPV)	Price	Value
1956						1957			
Jan.	490,755	$0.1250	$61,344.38	$0.08997	$44,153.23	Jan.	455,328**	$0.1675	$76,267.44
Feb.	521,894	"	65,236.75	"	46,954.80	Feb.	411,264**	"	68,886.72
Mar.	538,426	"	67,303.25	"	48,442.19	Mar.	455,328**	"	76,267.44
Apr.	357,725	"	44,715.63	"	32,184.52	Apr.	440,640**	"	73,807.20
May	414,397	"	51,799.63	"	37,283.30	May	455,328**	"	76,267.44
June	435,049	"	54,381.13	"	39,141.36	June	440,640**	"	73,807.20
July	396,971	"	49,621.38	"	35,715.48	July	455,328**	"	76,267.44
Aug.	506,933	"	63,366.63	"	45,608.76	Aug.	455,328**	"	76,267.44
Sept.	303,415	"	37,926.88	"	27,298.25	Sept.	440,640**	"	73,807.20
Oct.	364,702	"	45,587.75	"	32,812.24	Oct.	455,328**	"	76,267.44
Nov.	486,605	"	60,825.63	"	43,779.85	Nov.	440,640**	"	73,807.20
Dec.	559,058	"	69,882.25	"	50,298.45	Dec.	455,328**	"	76,267.44
Sub-Total	5,375,930	$0.1250	$671,991.29	$0.08997	$483,672.43		5,361,120	$0.1675	$897,987.60
Plus: Gathering tax payable by Shell and to be reimbursed to Shell by buyer.						Plus: Gathering tax payable by Shell and to be reimbursed to Shell by buyer.			
	5,375,930 MCF @.01 MCF		53,759.30		53,759.30		5,361,120 MCF @.01 MCF		53,611.20
Total			$725,750.59		$537,431.73				$951,598.80

* Shell and Texas Gas have been unable to agree on the price per MCF of gas payable after 9/1/53. Columns "A" show Shell's interpretation of contract price and consequent revenue. Columns "B" show Texas Gas' interpretation of contract price and the revenue paid by Texas Gas, which Shell collected under protest, during the 12 months preceding 1/1/57.

** Estimated.

Buyer—Defense Plant Corporation,
Washington, D. C.,

or at such other addresses as may be hereafter designated in writing by either party to the other for that purpose; and all payments to Seller hereunder shall be delivered or made to Seller, The Atlantic Refining Company, Magnolia Building, Dallas, Texas.

XVIII.

This contract shall be binding upon and inure to the benefit of the respective parties hereto and their successors and assigns.

In Witness Whereof, each of the parties hereto has caused this contract to be signed in its corporate name by its President, or one of its Vice-Presidents, and its corporate seal to be hereunto affixed and to be attested by [fol. 97] its Secretary or one of its Assistant Secretaries, all as of the day and year first above written.

Defense Plant Corporation,

BY W. E. Joyce
Vice-President

Attest:

Thomas Kelly
Assistant Secretary

Witnesses to the execution hereof by Defense Plant Corporation:

Lorraine V. Johnson
Mary Jean Ott

The Atlantic Refining Company,

BY E. H. Blum
Vice-President

ATTEST:

L. A. SIMKEL
Assistant Secretary

Witnesses to the execution hereof by The Atlantic Refining Company:

MAURINE MILLER
M. E. FORD

DISTRICT OF COLUMBIA, SS:

On this 17th day of Sept., 1943, before me appeared W. E. Joyce and Thomas Kelly, to me personally known, who being by me duly sworn did say that they are the Vice President and Assistant Secretary of DEFENSE PLANT CORPORATION, and that the seal affixed to this contract is the corporate seal of said corporation and that [fol. 98] said contract was signed and sealed on behalf of said corporation by authority of its Board of Directors, and said W. E. Joyce and Thomas Kelly acknowledged said contract to be the free act and deed of said corporation.

WITNESS my official signature and seal at Washington, D. C., on the day, month and year first above written.

MURIEL KNOLIN
Notary Public

(SEAL)

My commission expires
January 31, 1948.

STATE OF TEXAS:
COUNTY OF DALLAS: SS:

On this 11th day of Sept., 1943, before me appeared E. H. Blum, to me personally known, who being by me duly sworn did say that he is Vice-President of THE ATLANTIC REFINING COMPANY, and that the seal affixed to this contract is the corporate seal of said corporation and that the said contract was signed and sealed on behalf of said corporation by authority of its Board of Directors, and

the said E. H. Blum acknowledged said contract to be the free act and deed of said corporation.

WITNESS my official signature and seal at Dallas, Texas, on the day, month and year first above written.

EDMEA BARR VANDERWALL,
(SEAL) *Notary Public*

My commission expires
June 1, 1945.

[fol. 99]

ITEM NO. F BY REFERENCE

WAR ASSETS ADMINISTRATION
WASHINGTON 25, D. C.

October 26, 1948.

In reply refer to:
PIN-G

Plancor 1118

Union Sulphur Company
(Lake Charles Pipe Line)
Lake Charles, Louisiana

FPC Gas Rate
Schedule No. 55
Supplement No. 1
Filing Date: 10-1-54
Effective Date: Accepted

The Atlantic Refining Company
P. O. Box 2819
Magnolia Building
Dallas, Texas

Attention: Mr. W. L. Bowser

Gentlemen:

Reference is made to your telegram of October 7, 1948 which is as follows:

"CONFIRMING OUR 'PHONE CONVERSATION OF OCT 5 1948 THIS TO ADVISE THAT WE ARE WILLING TO AMEND PARAGRAPH 111 (B) OF THE CONTRACT DATED SEPT 1 1943 BETWEEN THE ATLANTIC REFINING CO AS SELLER AND DEFENSE

PLANT CORP AS BUYER TO PROVIDE THAT THE PRICE TO BE PAID FOR GAS DELIVERED DURING THE SIX MONTHS PERIOD FROM SEP 1 1948 TO MARCH 1 1949 OF THE SECOND FIVE YEAR PERIOD OF THE CONTRACT SHALL BE THE BASE PRICES PER MCF PROVIDED IN PARAGRAPH 111 (A) IN THE CONTRACT PLUS ONE AND FORTY FIVE ONE HUNDREDTHS CENTS AND PROVIDED FURTHER THAT AT THE END OF THE ABOVE MENTIONED SIX MONTHS PERIOD THE PARTIES THEIR SUCCESSORS OR ASSIGNS WILL NEGOTIATE IN ACCORDANCE WITH PARAGRAPH 111 (B) AND (D) THE PRICE TO BE PAID [fol. 100] FOR GAS DELIVERED DURING THE REMAINING FOUR YEARS AND SIX MONTHS OF THE SECOND FIVE YEAR PERIOD AS PROVIDED IN THE CONTRACT. OTHERWISE CONTRACT TO REMAIN AS ORIGINALLY WRITTEN. FORMAL LETTER AGREEMENT FOLLOWS W L BOWSER THE ATLANTIC REFINING CO"

As authorized by the adjustment provision (paragraph IIIb) of the gas purchase contract dated September 1, 1943, this Administration accepts your offer of 1.45¢ additional adjustments per 1000 cu. ft. of gas from September 1, 1948 through the month of February 1949 and also accepts the proviso that at the end of the above period the parties, their successors or assigns will negotiate, in accordance with paragraph III b and d, the price to be paid for gas delivered during the remaining four years and six months of the second five-year period as provided in the contract. This will make the adjusted price for the period September 1, 1948 through February 1949, 3.65¢ for gas to DPC plants and 4.15¢ for gas sold for use by other than Government-owned plants.

This letter is submitted in quadruplicate. Please indicate your Company's acceptance by signing all copies at the place indicated and return the original and two copies to this office.

Sincerely yours,

M. L. GODMAN
M. L. Godman
Deputy Administrator
Office of Real Property Disposal

Accepted this 29th day of October, 1948

THE ATLANTIC REFINING COMPANY
By E. H. BLUM
Title *Vice President*

[fol. 101]

WAR ASSETS ADMINISTRATION

ZONE V

Z5-1-97

P. O. Box 6030
Dallas 2, Texas

The Atlantic Refining Co.
P. O. Box 2819
Magnolia Building
Dallas, Texas

Subject: WAA Contract No. WS 7 (p) 337
Formerly Unnumbered
Modification No. 1
No. Assigned September 21, 1948
Plancor 1118—Union Sulphur Pipeline, Lake Charles, Louisiana

Gentlemen:

It is desired that the following changes be made to Contract Number Unnumbered-dated 9/1/48 formerly held by Reconstruction Finance Corporation

(a) Change Contract Number from Unnumbered to WS 7 (p) 337

(b) Disbursing Officer as shown in Paragraph XVIX of Contract changed from Defense Plant Corporation, Washington, D. C. to Accounting Division, War Assets Administration, P. O. Box 6030, Dallas 2, Texas

[fol. 102] The above changes will be effective as of July 1, 1948 which is the date RFC transferred custody of Plancor 1118 to WAA.

Very truly yours,

ROBERT F. MCDONALD, JR.
Robert F. McDonald, Jr.
Contracting Officer

Accepted by:

THE ATLANTIC REFINING CO.
Dallas, Texas

By: (Signed) E. H. BLUM
(Title) *Vice President*

NOTE: Please sign and return the original and 3 copies of this Modification.

ITEM NO. G BY REFERENCE

THE ATLANTIC REFG. CO.

P. O. Box 2819

DALLAS 1, TEXAS

FPC Gas Rate
Schedule No. 55
Supplement No. 2
Filing Date: 10-1-54
Effective Date: Accepted

MODIFICATION NO. 3 TO GAS PURCHASE CONTRACT
NO. WS 7 (P) 337.

THIS SUPPLEMENTAL AGREEMENT, entered into this 16th day of February, 1949, between RECONSTRUCTION FINANCE [fol. 103] CORPORATION, successor in interest to Defense Plant Corporation, acting by and through War Assets Administrator, pursuant to the provisions of the Surplus Property Act of 1944, as amended, hereinafter referred to as the Buyer, and The Atlantic Refining Company, a Pennsylvania Corporation, hereinafter referred to as the Seller;

WITNESSETH:

WHEREAS, the parties hereto entered into a contract dated September 1, 1943, for a term of twenty-five years, covering the sale by the Seller and the purchase by the Buyer of natural gas, in the quantities provided in said contract, for delivery to Buyer's Lake Charles Pipe Line, Plancor 1118; and

WHEREAS, the said contract provides, in Paragraph III (a) thereof that the purchase price therein provided shall be effective for the first five (5) years from the date of the contract, and, in Subparagraph (b) of Paragraph III, that at the end of the first five year period the Buyer and Seller shall reach an agreement as to the price for gas sold and delivered under this contract to be effective during the second five year period; and

WHEREAS, the first five year period above referred to expired on September 1, 1948; and

WHEREAS, an agreement was reached between Buyer and Seller as to the purchase price for the period September 1, 1948 to March 1, 1949 in letter agreement dated October 26, 1948, and it is desired by the parties hereto that a new agreement be reached as to the price to be effective during the remainder of the second five year period of the contract; and

WHEREAS, Seller and Buyer desire to modify the contract to provide for seller to be authorized to sell gas [fol. 104] from its North Tepetate Pool wells to others in addition to Buyer;

NOW, THEREFORE, the parties hereto, in accordance with the terms of the said contract and in consideration of the premises and the mutual covenants and conditions hereinafter set forth, do hereby mutually agree as follows:

1. Paragraph III of the said contract of September 1, 1943, is hereby amended to provide that, for the period beginning March 1, 1949, and ending August 31, 1953, the price of gas shall be five cents (5¢) net per one thousand (1,000) cubic feet of gas received at the central point herein provided for delivery into Buyer's pipe line system, and, in addition, Buyer shall reimburse Seller for all state severance taxes, or similar taxes, which Seller is obligated to pay and has paid to the State of Louisiana on such gas, it being understood and agreed that, should any portion of the gas transported by Buyer through its pipe line system, as herein referred to, be sold directly or indirectly to any person, firm or corporation for use other than in a

Government owned plant, or to other than a Governmental Agency or Government owned plant or corporation, or should any portion thereof be used by any future owner of said line other than a Governmental Agency or Government owned plant or corporation, Seller shall receive for its "proportionate part" of such gas so sold or used one-half cent (½¢) per thousand cubic feet in addition to the net price of five cents per thousand cubic feet hereinabove fixed, making a total net price of five and one-half (5½¢) cents per thousand cubic feet; such "proportionate part" to be that proportion of the sales to, or use by private parties during a calendar month that the quantity of gas purchased by Buyer from Seller during such month bears [fol. 105] to the total quantity of gas purchased by Buyer from Seller and all others during such month and delivered into Buyer's pipe line system.

2. Paragraphs I and II of said Gas Purchase Contract are hereby amended so that,

(1) Seller may, at any time and from time to time, sell to any purchaser or purchasers it chooses, by contracts for term of not to exceed ten (10) years, all or any part of that amount of gas which Seller shall be allowed under the applicable law and regulations to produce from its wells in the North Tepetate Pool (hereinafter called SELLER'S PRODUCTION ALLOWABLE) which is in excess of 25,000,000 cubic feet per day but not in excess of 35,000,000 cubic feet per day;

(2) At any time and from time to time when Buyer has not taken (or paid for it not taken) under said contract as amended, during the immediately preceding period of six (6) months, an average of as much as 25,000,000 cubic feet of gas per day, Seller may, after giving thirty (30) days' notice to Buyer, sell to such purchasers as it may select, by contracts for term of not to exceed five (5) years, up to one-half of that amount per day by which 25,000,000 cubic feet exceeds the average daily amount Buyer has taken (or paid for if not taken) during said six months' period; provided, however, that Buyer shall have the prior right within said period of thirty (30) days after such notice to elect to increase immediately the amount of

gas it is obligated to take (or to pay for if not taken) under said contract; as amended, for a period of not less than five (5) years so as to include one-half or more of such excess; and provided, further, that all such contracts with other purchasers for the sale of said gas shall provide [fol. 106] that Buyer shall have first call upon SELLER'S PRODUCTION ALLOWABLE from said wells up to the number of cubic feet of gas per day which Buyer is then entitled to take under said contract, as amended; and

(3) In the event SELLER'S PRODUCTION ALLOWABLE exceeds 35,000,000 cubic feet of gas per day, Seller may at any time and from time to time, after giving thirty (30) days' notice to Buyer, sell to such purchasers as it may select by contracts for term of not to exceed ten (10) years, all or any part of such excess; provided, however, that Buyer shall have the prior right within said period of thirty (30) days after such notice to elect to increase immediately the amount of gas it is obligated to take (or to pay for if not taken) under said contract, as amended, for a period of not less than ten (10) years so as to include all of such excess which Seller desires to sell.

3. Buyer may, at its option, pay Seller for gas which it is entitled to take but does not take under said contract, as amended, in which event the gas so paid for but not taken shall be deemed, for all purposes of said contract, as amended, to have been taken by Buyer thereunder.

4. In no event shall Seller be required, except at its election from time to time, to furnish more than 25,000,000 cubic feet of gas per day to Buyer under said contract, as amended.

5. In addition to the above, Buyer agrees to inform Seller, on or before the 20th day of each month, of the estimated amount of gas it shall require under said contract, as amended, for the succeeding month, and Seller may thereafter make such disposition as it desires of the difference in the amount which Buyer is entitled to take for that month and the amount which it estimates that it shall require thereunder for that month.

[fol. 107] 6. All conflicting provisions of the above mentioned Gas Purchase Contract, as amended, are hereby amended so as to give effect to the foregoing provisions hereof, and except as herein amended, all of the terms and conditions of the said contract of September 1, 1943, shall remain and continue in full force and effect.

7. This modification No. 3 is to be effective as of the first day of March 1949.

8. Letter agreement between Buyer and Seller dated October 26, 1948, setting forth the purchase price for the period September 1, 1948 to March 1, 1949, is hereby designated as Modification No. 2 to Contract WS 7 (p) 337.

In Witness Whereof, the parties hereto have caused this Modification No. 3 to be executed.

Reconstruction Finance Corporation
Acting by and through
War Assets Administrator

By Robert F. McDonald, Jr.
Robert F. McDonald, Jr.
Contracting Officer

Witnesses:

Evelyn E. Smallwood
Margaret Wootton

The Atlantic Refining Company
By E. H. Blum
Vice-President

Attest:

L. A. Sunkel
Asst. Secretary

[fol. 108]
State of Texas
County of Dallas

On this 11th day of February, 1949 before me appeared E. H. Blum, to me personally known, who, being by me duly sworn, did say that he is vice-President of The At-

LANTIC REFINING COMPANY, a corporation, and that the seal affixed to this instrument is the corporate seal of said corporation, and that the said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and the said E. H. BLUM acknowledged said instrument to be the free act and deed of said corporation.

WITNESS my official signature and seal at Dallas, Texas on the day, month and year first above written.

/s/ DORIS HOLCOMBE
Doris Holcombe
Notary Public

(SEAL)

STATE OF TEXAS
COUNTY OF DALLAS

On this 16th day of February, 1949, before me appeared ROBT. F. McDONALD, to me personally known, who, did acknowledge and say that he is Contracting Officer of War Assets Administration, which has no seal, and that the said instrument was signed and sealed on behalf of said War Assets Administration with full authority, and the said ROBT. F. McDONALD acknowledged said instrument to be the free act and deed of said War Assets Administration, and that he signed the same for the purposes and consideration therein expressed.

[fol. 109] WITNESS my official signature and seal at Grand Prairie, in Dallas County on the day, month and year first above written.

(SEAL) /s/ MARGARET G. BECK
Notary Public in and for
Dallas County, Texas

Margaret G. Beck

My commission expires June 1, 1949

Item No. H by Reference

WESTERN UNION

FPC Gas Rate
Schedule No. 55
Supplement No. 3
Filing Date: 10-1-54
Effective Date:
Accepted

DB 120 1949 MAY 25 PM 5 02

D. LLB 278 LONG GOVT PD-WUX DALLAS TEX 25 444 P-

ATLANTIC REFG CO-
MAGNOLIA BLDG BOX 2819 DAL (GK)-

THIS WILL ADVISE THAT PLANCOR 1118, LAKE CHARLES PIPE LINE, WAS SOLD TO LA NATURAL GAS CORPORATION, COMMERCIAL BANK BLDG, SHREVEPORT, LA EFFECTIVE MAY 11, 1949. THIS IS YOUR NOTICE THAT CONTRACT WS 7/P/337 DTD SEPT 1, 1943 AS AMENDED BETWEEN YOUR ORGANIZATION AND THE GOVERNMENT REPRESENTED BY WAR ASSETS ADMINISTRATOR HAS BEEN TRANSFERRED TO LOUISIANA NATURAL GAS CORP EFFECTIVE 8.00 AM CST MAY 11, 1949. ALL EXPENSES, OBLIGATIONS AND RESPONSIBILITIES UNDER CONTRACT AND PAYMENT FOR GAS RECEIVED FROM YOU AFTER SAID TIME AND DATE IS THE RESPONSIBILITY OF THE LOUISIANA NATURAL [fol. 110] GAS CORP. PLEASE ACKNOWLEDGE RECEIPT OF THIS TELEGRAM BY WIRE.

EN/RGP-PPM-R/61/WINSOR

WALLACE WAR ASSETS ADMN-

The Atlantic Refg. Co.
P. O. Box 2819
Dallas 1, Texas

1118 LA 11 1949 WS 7/P/337 1 1943 8.00 AM CST 11 1949
EN/RGP-PPM-R/61/WINSOR

RECEIVED
Oct 23 1952
NATURAL GAS SECT.

EXCERPTS FROM ITEM NO. J BY REFERENCE

"FPC Gas Rate Schedule No. 6
Filing Date: August 31, 1954
Effective Date: Accepted

AGREEMENT dated this 23rd day of February, 1951, between Tennessee Gas Transmission Company, a Delaware corporation, herein called "Buyer", and Shell Oil Company, a Delaware corporation, herein called "Seller", * * *.

"If at any time the cost per MCF of gas purchased by Buyer from any gas producer whomsoever in fields located in whole or in part within the limits of Commission District No. 3 of the Railroad Commission of Texas, as constituted at the date of this contract, shall be greater than the cost per MCF of gas purchased hereunder, Buyer will increase the price per MCF payable to Seller for gas delivered hereunder currently as deliveries are made, and only during periods in which Buyer in paying such greater cost to such other gas producer, by an amount equal to the difference between highest cost per MCF paid at the time by [fol. 111] Buyer to any such gas producer and the cost per MCF payable hereunder.

"If there is now or hereafter levied any Federal or State of Texas production, severance, gathering or similar tax in addition to or greater than those being levied on January 1, 1950, in respect of or applicable to the gas delivered hereunder and for which Seller is liable, so long as such additional or greater tax is in effect and paid by Seller on such gas, Buyer will reimburse Seller for three-fourths (¾) of the amount by which such additional or greater tax shall exceed the taxes then levied. The amount for which reimbursement is due may be billed by Seller monthly, or at the end of each calendar year."

[In its entirety, Item J by Reference is made up of 34 agreements filed with the Federal Power Commission to which Shell Oil Company is a party, each of which contains a price escalation provision. In addition to the provision printed immediately above, price escalation provisions substantially similar thereto are contained in eight other agree-

ments with Tennessee Gas Transmission Company. The dates of these agreements and the Shell Oil Company FPC Gas Rate Schedule numbers are as follows: February 1, 1953-No. 14 [R. 841]; April 1, 1956-No. 92, Supp. 3 [R. 1464]; March 3, 1955-No. 128 [R. 1575]; March 29, 1955-No. 130 [R. 1604]; October 1, 1953-No. 131, Supp. 1 [R. 1643]; November 1, 1955-No. 136 [R. 1708]; May 10, 1956-No. 137 [R. 1736]; and June 3, 1956-No. 143 [R. 1868].]

"FPC Gas Rate Schedule No. 10
Filing Date: August 31, 1954
Effective Date: Accepted

Gas Purchase Contract

THIS AGREEMENT Made and entered into as of this 18th day of June, 1948, by and between SHELL OIL COM- [fol. 112] PANY, a Delaware corporation (hereinafter referred to as "Seller") and TEXAS EASTERN TRANSMISSION CORPORATION, a Delaware corporation (hereinafter referred to as "Buyer"), * * *.

"3. If Buyer has entered into or should hereafter enter into a contract at any time or from time to time for the purchase of gas produced from a field or fields located in Texas or Louisiana for any part of the requirements of its Pipe Lines and such contract provides a price to be paid for such gas during any year, which differs from the price payable under this contract during the same year, Buyer shall promptly notify Seller thereof, giving full information as to the price provisions of such contract the terms thereof, and all other provisions of such contract which affect the remuneration to the Seller thereunder. Seller shall have the option within thirty (30) days after receipt of such information from Buyer to have such price provisions applied to gas thereafter delivered hereunder for the term of this contract or the term of such other contract, whichever term is the shorter, but subject to change by any subsequent election by Seller, as herein provided. Should such other contract have a shorter term than this contract, then for the period following the expiration of

apply. Should Seller not elect to accept any such different price provisions, it shall thereupon be foreclosed as to such rejected provisions for the duration of this contract."

[fol. 113] "FP" Gas Rate Schedule No. 12
Supplement No. 1
Filing Date: August 31, 1954
Effective Date: Accepted

THIS AMENDATORY AGREEMENT made and entered into this 1st day of January, 1950, by and between TENNESSEE GAS TRANSMISSION COMPANY, a Delaware corporation, hereinafter referred to as "Buyer", and MAGNOLIA PETROLEUM COMPANY, a Texas corporation, SUNRAY OIL CORPORATION, a Delaware corporation, SINCLAIR OIL AND GAS COMPANY, a Maine corporation (successor to Sinclair Prairie Oil Company, a Maine corporation), SUN OIL COMPANY, a New Jersey corporation, SHELL OIL COMPANY, a Delaware corporation (successor to Shell Oil Company, Incorporated, a Virginia corporation), . . .

• • • • • • •

"(c) If, at any time after September 1, 1952, the cost per MCF of gas purchased by Buyer from any gas producer in fields located in whole or in part within District No. 4 of the State of Texas, as constituted by the Railroad Commission of Texas at the date of this contract, shall be greater than the cost per MCF of gas purchased hereunder, Buyer will increase the price per MCF to Seller for gas delivered hereunder, currently as deliveries are made, and only during periods in which Buyer is paying such greater cost to such other gas producer, by an amount equal to the difference between the highest cost per MCF paid at the time by Buyer to any such gas producer and the cost per MCF payable hereunder. As used in this paragraph, the term 'cost per MCF" shall mean the purchase price per MCF plus the dehydration charge per [fol. 114] MCF paid by Buyer, if any, and taxes paid or payable by Buyer, and such cost shall be determined on the same basis of measurement, quality, and terms of delivery as are provided for gas delivered hereunder."

"FPC Gas Rate Schedule No. 18
Filing Date: August 31, 1954
Effective Date: Accepted

Agreement

THIS AGREEMENT, made and entered into as of the 1st day of February, 1950, by and between EL PASO NATURAL GAS COMPANY, a Delaware corporation with offices at El Paso, Texas, hereinafter sometimes referred to as "Buyer" and sometimes referred to as "El Paso", and SHELL OIL COMPANY, a Delaware corporation with offices at Houston, Texas, and THE TEXAS COMPANY, a Delaware corporation with offices at Fort Worth, Texas, said last two named parties being hereinafter sometimes collectively referred to as "Sellers" and sometimes referred to as "Shell" and "Texas," respectively; . . .

* * * * * * *

C. If at any time subsequent to the date of this agreement Buyer shall purchase any quantity of gas at a point located within a radius of two hundred fifty (250) miles of the Town of Andrews, Texas (but excluding what is known as the Texas Panhandle Field, comprising the Counties of Carson, Potter, Gray, Wheeler, Hutchinson, Sherman, Hansford and Moore, in the State of Texas), and pay therefor a consideration higher than the consideration payable at the same time hereunder, then the consideration payable hereunder which is less than the consideration being paid at the same time under such other contract [fol. 115] shall be immediately increased so that it will equal the consideration being paid at the same time under such other contract, and such higher price hereunder shall continue in effect so long as any such higher price is paid under such other contract. In determining whether the consideration payable under such other contract is "higher" then the consideration payable for gas under this agreement, due weight shall be given to the provisions of this agreement as compared with such other contract as to quality of gas, delivery pressures, gathering and compressing arrangements, provisions regarding measurement of

gas, including deviation from Boyle's Law, taxes payable on or in respect to gas delivered, and all other pertinent factors.

[fol. 116]

PLEADINGS

Before the Federal Power Commission

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

In the Matter of

Shell Oil Company

Docket No. G-121191

Order Accepting Rate Schedule for Filing and Providing for Hearing—Issued March 13, 1957

On November 18, 1954 Shell Oil Company (Shell) tendered for filing as its June 7, 1954 rate schedule[1] its contract dated May 1, 1951 with Texas Gas Transmission Company (Texas Gas).

Such rate schedule shows an original rate for gas deliveries of 9.997c per Mcf (including 1.0c tax reimbursement); however, Shell in its accompanying billing statement showed without explanation a rate of 13.5c per Mcf (12.5c plus tax reimbursement) therefor. By letter of January 6, 1955, Shell was advised that, pending explanation, no action would be taken on the tender, denominated as Shell's FPC Gas Rate Schedule No. 153.

By filing of February 11, 1957, Shell has proposed a change of rate (the subject of a separate order issued in Docket No. G-12192 contemporaneously herewith), and has

---

[1] See Regulations under the Natural Gas Act, Sec. 154.92 and 154.93.

explained its claim for the 13.5c per Mcf rate as based on a "favored nation" provision of Rate Schedule No. 153, which Shell claims, and Texas Gas denies, to have been triggered in February, 1954. It further appears that the issue of Shell's rates and charges effective on June 7, 1954 [fol. 117] (see Regulations Under the Natural Gas Act, Sec. 154.92 (a)) is the subject of proposed litigation between the parties to the contract.

The Commission finds:

It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Natural Gas Act, that the Commission accept for filing Shell's said Rate Schedule No. 153, tendered November 18, 1954, and that the Commission enter upon a hearing concerning the effective rate thereunder on June 7, 1954.

The Commission orders:

(A) Shell Oil Company's contract dated May 1, 1951 with Texas Gas Transmission Company is accepted for filing as Shell's Rate Schedule No. 153.

(B) Pursuant to the authority contained in the Natural Gas Act, particularly Sections 4, 5, 15 and 16 thereof, and the Commission's General Rules and Regulations [18 CFR, Chapter I], a public hearing shall be held commencing on April 22, 1957 at 10:00 a.m. (EST) in a Hearing Room of the Federal Power Commission, 441 G Street, N. W., Washington, D. C., for the purpose of determining and fixing the rate properly effective on June 7, 1954 for the sale of gas by Shell Oil Company under its FPC Gas Rate Schedule No. 153 to Texas Gas Transmission Company, and any other matters incident to such issue.

(C) Interested State commissions may participate as provided by Sections 1.8 and 1.37(f) of the Commission's Rules of Practice and Procedure [18 CFR 1.8 and 1.37 (f)].

By the Commission.

Joseph H. Gutride, Secretary.

[fol. 118]

BEFORE THE FEDERAL POWER COMMISSION

DECISION—Issued August 9, 1957

In the Matter of

SHELL OIL COMPANY

Docket No. G-12191

Upon an Order to Determine and Fix the Rate Properly Effective on June 7, 1954 Under FPC Gas Rate Schedule No. 153

APPEARANCES

For Shell Oil Company
Oliver L. Stone, Esquire, New York, New York
George C. Schoenberger, Jr., Esquire, New Orleans, Louisiana
William W. Westerfield, Jr., Esquire, New Orleans, Louisiana

For Texas Gas Transmission Corporation
Charles F. Detmar, Jr., Esquire, New York, New York
Loftus E. Becker, Esquire, New York, New York
Lawrence W. Keepnews, Esquire, Washington, D. C.

For Louisville Gas and Electric Company
Gavin Cochran, Esquire, Louisville, Kentucky
Samuel R. Wells, Esquire, Louisville, Kentucky

For the Staff of the Federal Power Commission
Robert M. Weston, Esquire, Washington, D. C.

Woodall, Presiding Examiner: On November 18, 1954, Shell Oil Company (Shell) tendered for filing, pursuant to Order No. 174-A, [1]as its June 7, 1954 rate schedule, a

---

[1] Now incorporated in Regulations Under the Natural Gas Act; see Sec. 154.92-93.

[fol. 119] contract dated May 1, 1951, between Shell as seller and Louisiana Natural Gas Corporation (Louisiana Natural), as buyer, covering the sale of natural gas produced by Shell from the Chalkley Field, Cameron Parish, Louisiana. Louisiana Natural was a 100% owned subsidiary of Texas Gas Transmission Corporation (Texas Gas), and was merged into the latter company in June 1955. Texas Gas, pursuant to Article IX of the contract, has succeeded to all the rights and obligations of Louisiana Natural thereunder. Texas Gas has also succeeded to all of the rights of Louisiana Natural under a contract between Atlantic Refining Company (Atlantic) and Defense Plant Corporation dated February 16, 1949 (Item G herein), and under which contract Louisiana Natural had gained the rights of Defense Plant Corporation. Thus Texas Gas stood in contract relations to Shell under the May 1, 1951 contract (F. P. C. Gas Rate Schedule No. 153 (Item A herein)) and to Atlantic under Item G herein.

On March 13, 1957, the Commission issued an order that Shell Oil Company's contract dated May 1, 1951 (which had been tendered for filing on November 18, 1954) with Texas Gas is accepted for filing as Shell's F. P. C. Gas Rate Schedule No. 153.

Issue

By its March 13, 1957 order the Commission also set a hearing (later continued to convene at 10:00 a.m., EDST on April 29, 1957) "for the purpose of determining and fixing the rate properly effective on June 7, 1954 for the sale of gas by Shell Oil Company under its F. P. C. Gas Rate Schedule No. 153 to Texas Gas Transmission Company, and any other matters incident to such issue." [2]

---

[2] As its Conclusion, the Staff's Brief recommends that this proceeding be dismissed "in respect of the contract interpretation question." The conclusion reads as follows:

"Under the settled interpretation of its powers and obligations, the Commission has no function in respect of determining and fixing the rate 'properly effective' on June 7, 1954, for the sale of gas by Shell to Texas Gas. The order of March 13, 1957, setting a hearing on the substantive question as to the correct rate under

[fol. 120] The question is not what price for gas Texas Gas was actually paying to Shell on June 7, 1954 or what dollars and cents Shell was actually receiving at that date because, as the Staff's Brief concludes: "It is uncontroverted that the rate actually being paid at June 7, 1954 was 8.997c per Mcf . . ." The Staff concludes that: "this is therefore the effective rate under such authorities." Their Brief had cited "In the Matter of Phillips Petroleum Company, Docket No. G-10908" and "In the Matter of Dorchester Corporation, Docket No. G-6505."

If these two cases are controlling upon the Commission as to all future determinations of the legally effective rate on June 7, 1954, so that it is only necessary to determine the dollars and cents actually being paid per Mcf of natural gas, then the Commission should agree with the Staff that its order of March 13, 1957 setting the hearing herein on the substantive question as to the correct rate, namely, what was the legally effective—"properly effective"—rate, under the Shell-Texas Gas contract was improper and of no avail and should be dismissed.

In such eventuality this decision should end here and now.

However, the undersigned, even if so empowered, does not agree that the Commission improperly issued the March 13, 1957 order setting the hearing herein for the [fol. 121] purpose of determining and fixing the properly effective rate under Shell's F.P.C. Gas Rate Schedule No. 153, because the Commission is both empowered and under law required to make such substantive determination and interpretation of the contract in question.

The recently decided *Trunkline* case holds squarely upon the controlling effect on this proceeding of the Commission's order setting this hearing, namely:

> "The order in the simplest and most direct words charted the course of this proceeding. . . . The result

---

the Shell-Texas Gas contract was, on the Commission authorities, improper and of no avail. It is uncontroverted that the rate actually being paid at June 7, 1954, was 8.997c per Mcf; this is therefore the effective rate under such authorities. The Presiding Examiner should so find, and should dismiss the proceeding in respect of the contract interpretation question."

is that the Commission must adjudicate this matter within the full framework fashioned by it." [3]

The *Mobile* doctrine directly applies to the effect that the contract between the parties is controlling and cannot be unilaterally changed by the action of one of the parties.[4] Hence, unless there is a complete lack of jurisdictional power to interpret the contract between the parties to determine the existing legal relations of the parties on June 7, 1954 as to the contract price then in force under the contract, the Commission has irrevocally (sic) entered upon such an adjudicatory process. There is no absence of delegated authority to determine and fix the legally effective contract rate between Shell and Texas Gas on June 7, 1954. Under the law of *U. S.* v. *Western Pacific Railway Company* (1956), 352 U. S. 59, the Commission has exclusive primary [fol. 122] jurisdiction to construe the contract which is the effective rate schedule to determine the properly effective rate on June 7, 1954—the date of initiating producer rate regulation under the Phillips producer case.[5] To fail or refuse to exercise such unquestioned jurisdiction involves the substantial hazard that Shell would thereby lose its day in any adjudicatory forum to obtain such a judicial construction of its rate schedule on the threshold date of June 7, 1954. To speculate whether a court would make up the deficiency in a suit on the contract points up the hazard created. As the Supreme Court in the *Western Pacific R. Co.* supra construes the law analogously to exhaustion of administrative remedies, it is enough here to recognize the hazard thus engendered to reaffirm that here as in other

---

[3] *Trunkline Gas Company* v. *F. P. C.* No. 16228, USCA (5th), decided July 23, 1957.

[4] *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation, et al.*, 350 U. S. 332. In support of the same underlying principle see *F.P.C.* v. *Sierra Pacific Power Company, et al.*, 350 U. S. 348. If by default one party can change the legally effective contract rate for rate regulation purposes, the validity of the whole contract procedure can be undermined.

[5] *Phillips Petroleum Co.* v. *Wisconsin* (1954), 347 U.S. 672.

areas, the existence of the primary and exclusive jurisdiction is accompanied by the regulatory duty to determine and fix the "properly effective" rate, which in this setting narrows the jurisdictional issue down to determine what is the rate agreed upon by the parties in their contract.

No party has even suggested that the Commission is without jurisdictional power or that public policy prevents the Commission from recognizing and giving effect to the contractual rate as of June 7, 1954. The Staff has said that "under the settled interpretation of its powers and obligations" in the *Phillips* case in Docket No. G-10908 and the *Dorchester* case in Docket No. G-6505, the Commission seemingly reached such a disabling conclusion. But such a construction of those two cases is shown to be unsound by the Briefs of Shell. Stated most succinctly the *Dorchester* case cannot be accepted as a precedent here, because it dealt with a different problem, namely, what sort of deficiency bond to require. Even though it tends actually to support Shell's position, it is not sound to apply [fol. 123] the case as a precedent. The same is true of the other proposed negative precedent. It is not sound to use it as a precedent because the Commission itself very carefully limited its action therein to that specific situation by the words: " . . . We consider that we should not, *at the present time in this proceeding* undertake to pass upon these matters, involving as they do an interpretation of the Phillips-Panhandle contract, and a purported determination of the private rights and obligations arising thereunder." (Italics supplied.) The limited action "at this time" and "in this proceeding" was repeatedly stressed. The case turned on requiring a new filing to effect a change in rates. "In that order we held that, notwithstanding that an increase in rates proposed by Phillips for sales to Panhandle Eastern Pipe Line Company (Panhandle) was due to an averred misunderstanding of the contract and a claimed consequent undercharge, Phillips must, in order to increase the rates it was charging on June 7, 1954, under its FPC Gas Rate Schedule No. 61 (which also constituted the contract between the parties), file a change in rates;

and that the mere filing of a revised billing statement did not suffice."[6]

When seeking case precedents another Phillips case—*Phillips Petroleum Co.* v. *F.P.C.* (1955) 10 Cir., 227 F2d 470, cited by Shell's Reply Brief, p. 31, clearly shows that the Commission has the primary jurisdiction to determine the legally effective rate under the existing contract on June 7, 1957. The contrasted decision of the same court in *Cities Service Gas Producing Company* v. *F.P.C.*, (1956) 10 Cir., 233 F.2d 726 (cert. den. November 12, 1956) both construes the Phillips case last cited and re-emphasizes [fol. 124] the Commission's power and duty to determine the contractual rate in force on June 7, 1954. Shell's Main Brief properly presents the law here (pp. 27, 28, 29).

Neither intervening private party denies the jurisdiction of the Commission to interpret Shell's contract. In fact, Texas Gas speaks clearly about it:

> "4. The Commission Has Jurisdiction
>
> "During the hearing on April 29th, the Presiding Examiner requested that the parties deal with the question of the extent of the jurisdiction of the Commission in the present proceeding (Tr. 104-11). We submit that the Commission has full jurisdiction—as well as the obligation—to interpret Shell's contract to the extent necessary to determine the Shell rate effective on June 7, 1954."[7]

Findings and Conclusions

Upon consideration of the entire record and the briefs of the parties, it is found and concluded:

1. The genesis of the dispute between Shell and Texas Gas out of which the issue herein arose are three contract provisions:

---

[6] Order issued May 31, 1957 in Docket No. G-10908.

[7] Answering Brief of Texas Gas, page 23.

(A) The favored-nation clause contained in Article VI,[8] paragraph 3, of Shell's F.P.C. Gas Rate [fol. 125] Schedule No. 153, which is its gas sale contract of May 1, 1951 with Louisiana Natural, Texas Gas' predecessor in interest, which wholly owned subsidiary was merged into Texas Gas on June 30, 1955.

(B) A gas purchase contract dated September 1, 1943 between Atlantic and Defense Plant Corporation covering the purchase of "the entire gas production of all wells and leases in the North Tepetate Pool in which seller now or hereafter has a full or part interest" (Item E herein) which Atlantic contract became the property of Louisiana Natural as of May 11, 1949 by assignment and, hence, now belongs to Texas Gas, and stipulated a price of 2.2c net per Mcf of gas for the first five years and further provided as to price as follows:

"*Article III*

"(a) . . . .

"(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price

---

[8] Also described as a price escalation provision, and which reads as follows:

"If at any time after December 31, 1951, Buyer shall enter into a contract providing for the purchase by it of gas produced from a field or fields located, and delivered to Buyer, within a radius of fifty (50) miles of any point of delivery provided hereunder, Buyer shall forthwith notify Seller of such fact, and if the price per one thousand (1000) cubic feet at any time payable under such other contract is higher than the price payable hereunder, each price payable hereunder which is less than the price payable at the same time under such other contract shall be immediately increased so that it will equal the price payable under such other contract. In determining whether the price payable under such other contract is 'higher' than the price payable for gas under this contract, due consideration shall be given to the provisions of this contract as compared with such other contract as to quality of gas, delivery pressures, gathering and compressing arrangements, quantity, provisions regarding measurement of gas, including deviation from Boyle's Law, taxes payable on or in respect of gas delivered and all other pertinent factors."

for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.

[fol. 126] "(c) During succeeding five-year periods, prices to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.

"(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII."

This quoted provision is a provision for price negotiation for 5-year periods subsequent to the first 5-year period. The contract further provided that it remain in effect for the life of the North Tepetate Pool, but not to exceed 25 years. It also provided in Article XII for arbitration, which provision has not come into use.

(C) The agreements amendatory of the Atlantic contract, to wit: Supplement No. 1 (Item F) accepted on the 29th of October 1948 by which the price for gas was agreed upon for the period September 1, 1948 through the end of February 1949; Supplement No. 2 (Item G) dated the 16th of February, 1949 by which the price for gas was agreed upon for the period beginning March 1, 1949 and ending August 31, 1953; and Supplement No. 3 (Item H) being a telegram from War Assets Administration to Atlantic giving notice of transfer of the Atlantic contract to Louisiana Natural effective on May 11, 1949, are not in issue herein. But Supplement No. 4 (Exhibit 9 herein), the agreement dated February 17, 1954 by which the price for gas was agreed upon for

the period beginning September 1, 1953 and ending August 31, 1958 at 12.2c net per Mcf at 15.025 p.s.i.a. plus .3c severance tax and 1c gathering tax payable to the State of Louisiana on such gas raises the question in dispute between [fol. 127] Shell and Texas Gas as to whether the February 17, 1954 Atlantic-Texas Gas price agreement caused the most favored nation or escalation clause in Shell's F.P.C. Gas Rate Schedule to become effective as of September 1, 1953, so that the price to Texas Gas during the next 5-year period for gas from Shell would equal the 12.5c plus gathering taxes (12.2c per Mcf plus .3c severance tax) payable by Texas Gas during that period for gas purchased from Atlantic. For convenience these three contract clauses will be referred to as (A) Shell's most favored nation or escalation clause; (B) the Atlantic contract price negotiation clause; and (C) the Atlantic third 5-year price agreement. No controversy between the parties is found to exist as to the facts found under this Finding No. 1.

2. For Shell's escalation clause to be triggered by any contract made by Texas Gas three things were required:

First, Texas Gas' contract must be after December 31, 1951, which the Atlantic third 5-year price agreement is.

Second, the contract must provide for the purchase of gas by Texas Gas "produced from a field or fields located, and deliver to 'Texas Gas,' within a radius of fifty (50) miles of any point of delivery provided" in Shell's F.P.C. Gas Rate Schedule No. 153. The parties have stipulated that the North Tepetate Field and the delivery point from Atlantic to Texas Gas meet such 50-mile provision.

Third, the price payable by Texas Gas under such contract is higher than the price then payable under

Shell's Rate Schedule No. 153, which condition is also met by the Atlantic third 5-year price agreement. The parties do not contest any of these three facts found in Finding No. 2.

3. By a filing on February 11, 1957, Shell proposed a rate increase to 16.75c per Mcf plus tax reimbursement as [fol. 128] Supplement No. 1 to its F.P.C. Gas Rate Schedule No. 153, which has been suspended by an order of the Commission issued on March 13, 1957, in another docket (G-12192) and such increase is not at issue herein. In connection with that filing Shell explained its claim that its favored nation clause had been triggered and that the price under its F.P.C. Gas Rate Schedule No. 153 had escalated prior to June 4, 1954, and that, hence, the legally effective contract rate on June 7, 1957 was 12.2c (net of tax reimbursement). Accompanying the filing of Rate Schedule No. 153, Shell had included a sample billing prepared by it to indicate that "we claim the contract price is 12.5 per Mcf (effective from September 1, 1953, but we have received only 8.997c per Mcf. This matter is now under negotiation with purchaser."[9]

---

[9] The hearing order issued March 13, 1957 contained the following recitation:

"Such rate schedule shows an original rate for gas deliveries of 9.997 cents per Mcf (including 1.0 cent tax reimbursement); however, Shell in its accompanying billing statement showed without explanation a rate of 13.5 cents per Mcf (12.5 cents plus tax reimbursement) therefor. By letter of January 6, 1955, Shell was advised that, pending explanation, no action would be taken on the tender, denominated as Shell's FPC Gas Rate Schedule No. 153.

"By filing of February 11, 1957, Shell has proposed a change of rate (the subject of a separate order issued in Docket No. G-12192 contemporaneously herewith), and has explained its claim for the 13.5 cents per Mcf rate as based on a 'favored nation' provision of Rate Schedule No. 153, which Shell claims, and Texas Gas denies, to have been triggered in February, 1954. It further appears that the issue of Shell's rates and charges effective on June 7, 1954 (see Regulations Under the Natural Gas Act, Sec. 154.92 (a)) is the subject of proposed litigation between the parties to the contract.

"The Commission finds:

[fol. 129] 4. Although some evidence introduced by Texas Gas would seem to have relevance to the debtor-creditor relationship between Shell and Texas Gas, all counsel participating in the proceeding appear to agree that the Commission does not have jurisdiction to determine herein matters of debt nor to adjudicate accord and satisfaction or other pleas in abatement which might lie in a proper court action on the contract. It is held that the Commission's jurisdiction is that which it stated in its order, namely, to determine and fix the rate properly effective on June 7, 1954 for the sale of gas by Shell under its F.P.C. Gas Rate Schedule No. 153 to Texas Gas. We, therefore, give no operative effect upon the sole issue here posed, to those facts in evidence, which bear upon possible laches by Shell in not earlier asserting its claim of escalation or upon the question of accord and satisfaction by reason of the acceptance of the lesser price as tendered by Texas Gas or by reason of responses to auditor's confirmation letters. Similarly the failure of Texas Gas (or its predecessor) to give notice to Shell of the Atlantic third 5-year price agreement is not deemed relevant to the determination lawfully involved in this proceeding.

5. The most favored nation or escalation clause in Shell's Rate Schedule No. 153 was brought into operation by the execution by Texas Gas of the Atlantic third 5-year price agreement dated February 17, 1954. Therefore, the effective contract price of gas on and after September 1, 1953 and for the ensuing 5-year period ending August 31, 1958 is that fixed on such February 17, 1954, namely, 12.2c plus .3c for severance tax plus 1c for gathering tax per Mcf at the pressure base of 15.025 p.s.i.a. of gas. The conclusive language of the Shell Rate Schedule's escala-

---

"It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Natural Gas Act, that the Commission accept for filing Shell's said Rate Schedule No. 153, tendered November 18, 1954, and that the Commission enter upon a hearing concerning the effective rate thereunder on June 7, 1954."

tion clause in relation to these facts are: "If . . . Buyer shall enter into a contract providing for the purchase by it of gas produced from a field or field located. . . . " The action which fulfilled the condition was, the making of a *new* price agreement by Texas [fol. 130] Gas with Atlantic, which is evidenced by the letter dated February 17, 1954 from Atlantic, to Louisiana Natural, and which the Buyer "Agreed to and Accepted this 22 day of February, 1954." (Exhibit 9 herein). The escalation clause did *not* require a complete gas purchase contract, as Texas Gas erroneously quotes its provision.[10] It merely required that the "Buyer shall enter into a contract providing for the purchase by it of gas" etc. It did not require a new or different source of gas than Buyer had theretofore contracted for. It merely provided for "gas produced from a field or fields located, and delivered to Buyer, within a radius of fifty (50) miles of any point of delivery provided hereunder. . . . " The argument between Shell and Texas Gas (in which Louisville Gas & Electric Company joined) as to whether the language is ambiguous, is a false issue. The language is clear enough to reveal the intent of the parties without resort to parole evidence or self-serving memoranda. To miss its plain meaning is to do violence to the generally accepted and reasonable meaning of the sequence of the words of the English language used. The simplest analysis reveals the heart of the matter. Shell sought to cause its selling price to rise to that called for by any other contract Buyer made for gas after an agreed date (December 31, 1951)—less than one year after the sale had been initiated, if the gas was produced in the same general area of competition as agreed upon (50 miles). The language was evidently broad; not narrowly technical in character. Contrary to Texas Gas' argument that the contract "could have so provided" . . . "if, as Shell argues, it had intended that its Louisiana Natural

[10] Answering Brief of Texas Gas, page 7, line 12.

price would escalate every time Louisiana Natural paid a higher price for gas in the defined area" (after the agreed date) the language of the contract clearly so provides exactly that by leaving the phrase, to wit: "a contract providing for the purchase by it of gas" [fol. 131] general in scope. That language other than that would produce the same intent, such as cited from some other contract by Texas Gas' Answering Brief is of no significance. The four events as conditions precedent to price escalation, for which Texas Gas contends have been satisfied, namely: (1) occurrence after December 31, 1951, which everyone conceded, (2) entry by Texas Gas into "a contract providing for the purchase by it of gas," which the February 17, 1954 third 5-year price agreement satisfied, (3) within a specified area, which everyone conceded, and (4) at a higher price, which obviously everyone conceded.

6. Turning now to the Atlantic contract price negotiation clause and the Atlantic third 5-year price agreement entered into pursuant thereto, it is obvious, of course, that the clause is *not* a 5-year periodic price escalation clause having fixed and agreed upon steps. The price increases must be agreed upon all over again for each 5-year period or resort had to arbitration. The Atlantic contract in Article III, Sections (b) and (c), beyond question requires that "the price to be paid during such second five-year period, is to be agreed upon at the beginning of such period," and that "during succeeding five-year periods, prices to be paid" must be agreed upon "at the beginning of each period." In the event that the parties are unable to agree upon the price to be paid after the first five-year period then arbitration must be resorted to. The record shows that the parties to that agreement had agreed upon the prices to be paid during the second 5-year period—September 1, 1948 to August 31, 1953, and although not done strictly in accordance with the contract, namely, at the beginning of such period, Texas Gas has alleged no failure of performance by its predecessors in interest. Supplement No. 1 (Item

F herein) was accepted on the 29th day of October 1948 (not on or before September 1, 1948) and it covered the period only from September 1, 1948 through February 28, 1949—6 months; not 5 years. Supplement No. 2 (Item G herein) covered the re-[fol. 132] maining 4½-year period. This supplemental agreement was signed by the Reconstruction Finance Corporation (RFC) successor in interest to Defense Plant Corporation, acting by and through War Assets Administrator, who expressly acknowledged that as amendatory of the Atlantic Contract (Item A herein) the supplemental agreement is contractually controlling. It is held that Supplement No. 4 (Exhibit 9 herein), which effected a new agreement as to the price to be paid by Texas Gas' predecessor during the third 5-year period (September 1, 1953 through August 31, 1958) is also contractually controlling and, therefore, constitutes "a contract providing for the purchase by" Texas Gas "of gas . . ." within the meaning of Section 3 of Article VI of Shell's Rate Schedule No. 153. Shell's Briefs correctly review the elemental principles of contract law, which in our view are too commonly known to the legal profession to require citations in support thereof. Of course, without a price for the gas to be sold the gas purchase contract falls. The agreement upon price for each succeeding 5-year period (unless supplied by the agreed upon alternative of arbitration) is indispensable to the continuance of the contractual relations of purchase and sale of gas.

Order

Wherefore, It Is Ordered, subject to review by the Commission, that:

(A) The rate effective on June 7, 1954, for natural gas sold and delivered by Shell Oil Company to Texas Gas Transmission Corporation under Shell Oil Company's F.P.C. Gas Rate Schedule No. 153, being a certain gas purchase contract dated May 1, 1951, by and between Shell Oil Company, producer and

seller, and Louisiana Natural Gas Corporation, the buyer, covering the sale of natural gas in the Chalkley Field, Cameron Parish, Louisiana, between September 1, 1953 and August 31, 1958, both inclusive [fol. 133] is 12.2 cents net for each 1,000 cubic feet at a pressure base of 15.025 p.s.i.a. of gas, and, in addition Texas Gas Transmission Corporation reimburses Shell Oil Company for all severance and gathering taxes payable by Shell Oil Company to The State of Louisiana on such gas.

(B) Within forty-five (45) days from the effective date of this order, Shell Oil Company shall file with the Federal Power Commission under its F.P.C. Gas Rate Schedule No. 153, a billing statement, reflecting the rate for the sale and purchase of natural gas specified above in ordering clause (A) as the legally effective and exclusively collectible and payable rate therefore during the period therein stated, subject to the provisions of the Natural Gas Act.

Emery J. Woodall, Presiding Examiner.

Filed: August 9, 1957
Issued: August 9, 1957

Before the Federal Power Commission

Before Commissioners: Jerome K. Kuykendall, Chairman, Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

Docket No. G-12191

In the Matter of

Shell Oil Company

Order Determining Rate—Issued November 12, 1957

Pursuant to the Commissioner's order issued March 13, 1957, the purpose of this proceeding is to determine Shell

[fol. 134] Oil Company's rate properly effective on June 7, 1954, for the sale of gas from the Chalkley Field, Cameron Parish, Louisiana to Louisiana Natural Gas Corporation. The rate schedule involved was tendered for filing by Shell on November 18, 1954, as its rate schedule effective on June 7, 1954.[1] The rate schedule was embodied in a contract dated May 1, 1951, between Shell and Louisiana Natural, which was merged into its parent company, Texas Gas Transmission Corporation, in June of 1955. In order to simplify the discussion we shall refer to Texas Gas as the buyer with respect to periods both before and after the merger.

The price for gas actually set forth in Shell's contract with Texas Gas was 8.997 cents per Mcf at 15.024 psia for the period January 1, 1952, through December 31, 1956, excluding one cent tax reimbursement. However, in connection with the filing Shell submitted a billing form stating that it claimed that the contract price was 12.5 cents per Mcf effective from September 1, 1953 (including a severance tax of .3 cents per Mcf but excluding a gathering tax of one cent per Mcf), although it was actually receiving only 8.997 cents per Mcf. On February 11, 1957, Shell filed a supplement to its rate schedule purporting to increase the rate to Texas Gas from 12.5 cents to 16.75 cents per Mcf, exclusive of the gathering tax. In this filing Shell explained its claim for the 12.5 cent per Mcf rate under the existing contract and rate schedule as based on a "favored nation" provision in the contract which it claimed had been "triggered" on February 17, 1954, by Texas Gas entering into a contract for the purchase of gas at 12.5 cents per Mcf at 15.025 psia from The Atlantic Refining Company. [fol. 135] On March 13, 1957, we accepted Shell's 1951 contract as its F.P.C. Gas Rate Schedule No. 153 and ordered a public hearing to determine the rate properly effective

---

[1] We chose this date in our order No. 174-B, now incorporated in Regulations under the Natural Gas Act (see Sec. 154.92-93), as of which all independent producers should file their rates, for this was the date on which we were informed of our jurisdiction over the independent producers in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672.

June 7, 1954, and at the same time in docket No. G-12192 suspended Shell's increased rate of 16.75 cents per Mcf.

After intervention was permitted on the part of Texas Gas and Louisville Gas and Electric Company, the hearing was held on April 29, 1957. On August 9, 1957, the presiding examiner issued his decision in which he found that Shell's rate under its Rate Schedule No. 153, effective June 7, 1954, was 12.2 cents per Mcf at a pressure base of 15.025 psia (excluding taxes), and ordered Shell to file a billing statement in accordance with this determination. Exceptions were filed by Texas Gas, Louisville Gas and by the staff of this Commission.

Before proceeding to determine the effective rate on June 7, 1954, we note that it seems clear to us that we have full authority to do so as the presiding examiner found. As June 7, 1954, was the date of the *Phillips* case informing us that we had jurisdiction over the rates of independent producers, we chose this date in our order No. 174-B as of which they should file their effective rates with the Commission in accordance with the filing requirements of the Natural Gas Act (Regulations, Section 154.92 (a)). Any changes in rate made after this date would have to be filed in accordance with section 4 (d) of the Act and our Regulations and could be suspended under section 4 (e). It would, of course, be necessary in connection with any rate proceeding after suspension of increased rates, such as the proceeding actually instituted against Shell by our order issued March 13, 1957, in docket No. G-12192, that we know the rate previously in effect both for the purposes of the [fol. 136] proceeding and in computing refunds if it should turn out that the new rate, or part of it, was not justified. We, therefore, instituted this proceeding to make this determination as we have in other instances. In two cases reaching opposite results as to whether a suspendible rate change had been instituted after June 7, 1954, our authority to determine the rate effective June 7, 1954, was in effect upheld. *Phillips Petroleum Co.* v. *F.P.C.*, 227 F. 2d 470 (CA 10) certiorari denied 350 U. S. 1005; *Cities Service Gas Producing Co.* v. *F.P.C.*, 233 F. 2d 726 (CA 10); certiorari denied. 352 U. S. 911.

Turning to the substance of this controversy, we differ with the presiding examiner's conclusion that Shell's effective rate for its sale to Texas Gas as of June 7, 1954, was 12.2[2] cents per Mcf at 15.025 psia, but find that the effective rate on June 7, 1954, was 8.997 cents per Mcf at 15.025 psia excluding taxes, for that was the charge actually being collected from Texas Gas. Furthermore, we also arrive at this conclusion by our determination that the 8.997 cent charge was that provided in Shell's 1951 contract with Texas Gas, for we are of the opinion that the escalation clause in Shell's contract was not "triggered" by Texas Gas' agreement with Atlantic for increased rates dated February 17, 1954.

In our previous cases including *Dorchester Corporation,* 14 F.P.C., Docket No. G-6505, November 14, 1955, and *Phillips Petroleum Company,* 17 F.P.C. 503, we have held that the legally effective rate on June 7, 1954, was the rate actually effective and actually being paid on that date. In the present case, as we have noted, the price stated in the [fol. 137] contract for the period January 1, 1952 to December 31, 1956 is 8.997 cents per Mcf measured at 15.025 psia. The undated invoice filed with the rate schedule sets forth a contract price of 12.5 cents per Mcf but notes:

> We claim that the contract price is 12.5c per Mcf (effective from September 1, 1953), but we have received only 8.997c per Mcf. This matter is now under negotiation with purchaser.

Also attached to the filing was a statement on Texas Gas' letterhead dated May 31, 1954, crediting Shell's account for the gas purchased from Shell at the rate of 8.997 cents per Mcf. It clearly appears, therefore, that the price actually collected on June 7, 1954, is 8.997 cents, and this under our previous decisions is the effective rate as of that date and continues on from that date until changed in accordance with Section 4 of the Natural Gas Act and our Regulations.

---

[2] Excluding a .3 cent severance tax and a one-cent gathering tax.

Using this approach we need not determine what was Shell's proper rate under its 1951 contract with Texas Gas as of June 7, 1954, but even if we do so, as an alternative ground, the result is the same on the basis of this record. For as already stated, we are of the opinion that the 8.997 cent charge in Shell's contract was not escalated by Texas Gas' purchase of gas at a higher price from Atlantic as Shell claims. The agreement with Atlantic does not constitute a new contract as required by Shell's escalation clause, but merely represents action taken under a pre-existing contract between Texas Gas and Atlantic.

Shell's contract was prepared by Texas Gas and was accepted by Shell in Houston, Texas. The gas reserves were located in the Chalkley Field in Louisiana and delivery was to be made at a central point in that field. Article VI, paragraph 3, of the contract provides as follows for escalation of the price where the buyer enters into a contract for the purchase of gas from another party:

> [fol. 138] 3. If at any time after December 31, 1951, Buyer shall enter into a contract providing for the purchase by it of gas produced from a field or fields located, and delivered to Buyer, within a radius of fifty (50) miles of any point of delivery provided hereunder, Buyer shall forthwith notify Seller of such fact, and if the price per one thousand (1000) cubic feet at any time payable under such other contract is higher than the price payable hereunder, each price payable hereunder which is less than the price payable at the same time under such other contract shall be immediately increased so that it will equal the price payable under such other contract. . . .

The record shows that by letter dated February 17, 1954, Texas Gas entered into an agreement with Atlantic for the redetermination up to 12.5[3] cents per Mcf at 15.025 psia of

---

[3] The letter agreement stated the price to 12.2 cents per Mcf but this excluded the .3 cent state severance tax which would bring the total price up to 12.5 cents (not including the one-cent gathering tax).

the price of gas received from Atlantic under a contract dated September 1, 1943. This basic contract was entered into between Atlantic and Texas Gas' predecessor in interest, Defense Plant Corporation, and provided for the sale and delivery of gas to the buyer in the North Tepetate pool of Acadia Parish, Louisiana, within the geographical limitations of the escalation clause.

The contract was signed by Atlantic's representative in Dallas, Texas, and at a later date by the representative of the Defense Plant Corporation in the District of Columbia.

The contract provided for price redeterminations after the end of succeeding five-year periods in the following language contained in Condition III:

> (b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price [fol. 139] for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.
>
> (c) During succeeding five-year periods, prices to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.
>
> (d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII.

Condition XII makes it clear that where the parties are unable to agree arbitration of the price dispute is assured. It provides that one arbitrator is to be appointed by Seller, one by Buyer, and a third by the two so chosen. In case one party refuses to appoint a second arbitrator, the first arbitrator shall act alone; if two arbitrators are chosen and fail to select a third, the third arbitrator shall be ap-

pointed by the senior judge of the Fifth Federal Judicial Circuit upon application by either party. The arbitration provision was not invoked for the second five-year period, nor, as we have seen, for the third period beginning September 1, 1953. Pursuant to the price redetermination agreement the price as of the latter date had reached 5.437 cents per Mcf plus reimbursement of a .3 cent severance tax and one-cent gathering tax per Mcf, and, as we have seen, by the letter agreement of February 17, 1954, was fixed at 12.2 cents per Mcf for the third five-year period plus .3 cents severance tax and one-cent gathering tax.
[fol. 140] The question before us is whether the letter agreement constitutes a new contract for the purchase of gas or whether it merely represents action taken pursuant to the pre-existing 1943 Atlantic contract. We believe the latter is the correct view. In reaching this result it is not necessary for us to consider whether paragraph (b) quoted above providing for agreement after a survey of prevailing prices is certain enough to extend the contract after the first five-year period, for paragraph (d) provides for a definite method by which a price will be fixed in case the parties fail to agree. The cases show that a contract will not fail for want of certainty where a future price is to be fixed by arbitrators or other third parties. *Sanitary Farm-Dairies* v. *Gammel*, 195 F. 2d 106 (CA 8); *Aitchison* v. *Anderson*, 183 F. 2d 922, 925 (CA 9); *United Fuel Gas Co.* v. *Columbian Fuel Corporation*, 165 F. 2d 746 (CA 4); *Baum* v. *Rock*, 106 Colo. 567, 108 P. 2d 230, 232-233.

In the *United Fuel* case the producer Columbian Fuel entered into a contract to sell gas to United Fuel at 15 cents up to November 1, 1940. On that date and every five years thereafter the price was to be determined by agreement or arbitration but was to be not less than 15 cents per Mcf. The parties agreed on 15 cents per Mcf during the first five-year period but a dispute arose over an arbitration award for the second five-year period beginning November 1, 1945. In discussing the contract and upholding the award, there was no suggestion that the contract was invalid although it left the price open for agreement or arbitration. In the Baum case the court held that uncertainty in the contract as to the amount of a product to

be purchased in the renewal period was relieved by provision for arbitration.

We do not think that any possible view as to the applicable state law alters this conclusion. The Shell 1951 contract, containing the rate involved, was clearly made [fol. 141] in Texas; from the signatures it would appear that the 1943 Atlantic contract was made in the District of Columbia; both were to be performed in Louisiana.[4] The Uniform Sales Act in force in the District provides that "The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed . . ." and refers to "a contract to sell or a sale of goods at a price or on terms to be fixed by a third person" showing that a price indefinite in the contract may be fixed by an outside party. (D. C. Code §28-1109, 1110). The Uniform Sales Act is not in force in Texas, but the law of that state does not appear to differ on this point.

If we apply the law of Louisiana, as advocated by Shell, the result appears to be the same. It is true that under the Louisiana Civil Code a certain price is necessary to perfect a contract of sale and a sale (LSA, Articles 2439, 2456, 2464, 1764), but the Code also provides (Article 2465);

> The price, however, may be left to the arbitration of a third person; but if such person can not, or be unwilling to make the estimation, there exists no sale.

As we have seen here the Atlantic contract provides a sure method by which arbitration will be brought about. In *Louis Werner Sawmill Co.* v. *O'Shee*, 111 La. 817, 35 So. 919, there was an undertaking to purchase land with the price dependent on the amount of lumber on it as determined by two estimators to be chosen by the respective [fol. 142] parties. Since the two estimators could not agree, the court noted that either party had the power to nullify

---

[4] According to the Restatement of the Conflict of Laws (S332) the law of the place of contracting determines the validity and effect of a promise with respect to, among other things, the mutual assent or consideration, if any, required to make a promise binding and any other requirements for making a promise binding. See also Beale, The Conflict of Laws (1935) SS 332.4, 346.5.

the agreement by refusing to appoint an expert, and would not enforce the contract. It, however, quoted a French authority as follows:

> If, for example, after the parties had said that the sale was made for a price as to which they would agree thereafter, they added, or which, in case of disagreement, should be fixed by an expert to be appointed by the parties themselves or by the judge of the district, it is clear that there would be a sale, since it would no longer be within the power of the parties to prevent the fixing of the price. (35 So. at 921).

As said in *Brown* v. *City of Shreveport*, 15 So. 2d 234, (La. App.) "That which may be made certain in such a contract in legal contemplation is certain." (15 So. 2d at p. 236).

Because the questions of law here involved have been adequately briefed before the presiding examiner we do not believe any purpose would be served by holding oral argument as requested by Shell.

The Commission further finds:

(1) Shell is an independent producer of natural gas engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption, subject to the jurisdiction of the Commission, and is, therefore, a "natural-gas company" within the meaning of the Natural Gas Act.

(2) The sale of natural gas by Shell to Texas Gas made pursuant to the provisions of Shell's F. P. C. Gas Rate Schedule No. 153 is a sale of natural gas for resale for ultimate public consumption within the meaning of the Natural Gas Act.

[fol. 143] (3) The charge for natural gas by Shell under its F. P. C. Gas Rate Schedule No. 153 to Texas Gas, effective June 7, 1954, is 8.997 cents per Mcf at 15.025 psia excluding the one-cent gathering tax.

The Commissioner orders:

(A) Within thirty days from the issuance of this order, Shell shall file a revised billing statement to reflect its effective rate on June 7, 1954, to Texas Gas under Rate Schedule No. 153.

(B) Exceptions filed with respect to the initial decision of the presiding examiner which are inconsistent with our action herein are hereby denied.

(C) Shell's motion for oral argument is hereby denied. By the Commission. Commissioner Connole concurring in the result.

Joseph H. Gutride, Secretary.

Docket No. G-12191

In the Matter of

SHELL OIL COMPANY

(Issued November 12, 1957)

CONNOLE, Commissioner, concurring in the result:

I concur with the result reached by the majority but dissent on one of the two grounds on which their determination is based.

The legally applicable and effective rate on June 7, 1954, is found in the contracts which we ordered the parties to file and which we denominated as rate schedules (Sec. 154.92-93 of Commission Rules) and is not measured by the monies which may have changed hands [fol. 144] at that time. In fact, if no monies at all had changed hands, the rate would still be that prescribed in the contract. I have demonstrated this proposition before. See my separate statements in *Re Dorchester Corporation*, G-6505, November 14, 1955, 14 F.P.C. ——, *Re Phillips Petroleum Company*, G-10908, April 5, 1957, 17 F.P.C. 503, and *Re Kerr-McGee Oil Industries, Inc.*, G-13181, November 1, 1957, 18 F.P.C. ——.

It has been specifically upheld by the United States Court of Appeals, Tenth Circuit, in *Phillips Petroleum Company* v. *Federal Power Commission*, 227 F. 2d 470, certiorari denied 350 U. S. 1005. Accordingly, I need only reiterate the validity of the proposition and assert its applicability here.

If no other issue were involved, I should be compelled to dissent from my Brothers on the result of this order, since the majority herein find that the legally effective and applicable rate on June 7, 1954, was measured by the monies changing hands on that date. However, because the majority determination is based on another proposition with whose reasoning I am in agreement, I must concur in the result. This second proposition states that the rate for the sales of gas here before us on June 7, 1954, was not affected by a letter of agreement by and between Texas Gas and The Atlantic Refining Company dated February 17, 1954. This proposition is sound in law and fact. As a result the rate in effect on June 7, 1954, according to the terms of the contract, is not that for which Shell contends.

The primary responsibility for the interpretation of the legal effect of tariff or rate schedules filed by regulated companies vests in the regulatory agency with whom they are filed. Preliminary resort to the Commission is required because the inquiry is essentially one of fact and of discretion in technical matters; and uniformity in the interpretation of so common a clause as is involved here can be obtained only if its determination is left to the Commission. *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291. [fol. 145] See also *Northwestern Public Service Co.* v. *Montana-Dakota Utilities Co.*, 181 F. 2d 19 (8th Cir. 1950).

Under our Rules the Texas Gas-Shell contract was filed as a rate schedule. The interpretation of the contract, therefore, *in its capacity as a rate schedule* is our responsibility primarily and to the extent that the discharge of this responsibility requires the interpretation of the legal effect of a given set of facts in the

light of its terms and conditions, we have the right and the duty to do so. This right and duty, of course, is to be distinguished from the invalid presumption by a regulatory commission to make conclusions of law on matters of strict private contract, the making of which has not been and, indeed, constitutionally could not be delegated to this Commission. See my separate statement in *Re American Louisiana Pipe Line Company*, G-10396, January 11, 1957, 17 F.P.C. 22. No attempt is made here to interpret terms of any contract, letter or other agreement in any capacity other than as a rate schedule and in any of its terms other than those directly affecting the applicability and effectiveness of the rates prescribed therein.

Exercising this jurisdiction, majority has undertaken to interpret whether the terms and conditions of the Texas Gas and Shell contract are affected by the letter agreement between Texas Gas and Atlantic. Majority has found that they are not. The determination is factually accurate, lawfully correct and logically unassailable. Inevitably it leads to the conclusion that the applicable and effective rate for the transaction here in question on June 7, 1954, was 8.997 cents per Mcf at 15.025 psia for the period January 1, 1952, through December 31, 1956, excluding one cent tax reimbursement, as provided in the original contract between Shell and the predecessor of Texas Gas dated May 1, 1951. Accordingly, I concur in the result reached by my Brothers.

William R. Connole

[fol. 146]

BEFORE THE FEDERAL POWER COMMISSION

Docket No. G-12191

IN THE MATTER OF SHELL OIL COMPANY

APPLICATION FOR REHEARING BY SHELL OIL COMPANY—
Filed December 11, 1957

• • • • • • •

Now comes Shell Oil Company (Petitioner) and shows that the Order Determining Rate issued herein by the Commission on November 12, 1957 is contrary to the law and the evidence and is erroneous; that Petitioner is aggrieved thereby; and that the Commission should reconsider the conclusions reached in said Order, grant a rehearing thereof and affirm the decision of the Presiding Examiner.

The grounds relied upon in support of this petition are the following:

1. The decision of the Presiding Examiner is correct in fact and in law. The Commission erred in not affirming the decision of the Presiding Examiner.

2. The Commission erred in finding (p. 2) the "effective rate on June 7, 1954 was 8.997 cents per Mcf at 15.025 psia excluding taxes, for that was the charge actually being collected from Texas Gas", and in concluding (p. 3) "It clearly appears, therefore, that the price actually collected on June 7, 1954 is 8.997 cents, and this under our previous decisions is the effective rate as of that date and continues on from that date until changed in accordance with Section 4 of the Natural Gas Act and our Regulations." [fol. 147] We admit that 8.997 cents was actually being paid on June 7, 1954. This amount was collected by Shell while claiming it was entitled to the higher price. But we deny that the payment factor alone establishes the effective rate. The Commission's conclusion that the effective rate was not as the parties contracted but as one of the contracting parties saw fit to interpret its obligation, is insupportable in reason, and is contrary to law, the Natural Gas

Act, the Commission's Regulations, the principles announced in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332; *Natural Gas Pipeline Co. of America* v. *Harrington*, 246 F. 2d 915; *Memphis Light, Gas & Water Division* v. *Federal Power Commission* (U.S.C.A., D.C., decided November 21, 1957, not yet reported); and is violative of the Fifth Amendment to the Constitution of the United States in that, by construing its Regulations as it has, the Commission's order deprives Petitioner of its property without due process of law by impairing Petitioner's contract right to receive for its property the price agreed to be paid therefor by the buyer, and arbitrarily substitutes the amount which the buyer saw fit to pay for the amount which the contract obligated it to pay.

• • • • • • •

3. The Commission erred in treating this case as governed by its decisions in the *Dorchester* and *Phillips* cases.

• • • • • • •

4. The Commission erred (pp. 2 and 3) in determining "that the escalation clause in Shell's contract was not 'triggered' by the Texas Gas' agreement with Atlantic for increased rates dated February 17, 1954", and in concluding [fol. 148] (p. 3) that the 8.997 cent rate was not escalated because "The agreement with Atlantic does not constitute a new contract as required by Shell's escalation clause, but merely represents action taken under a pre-existing contract between Texas Gas and Atlantic." These conclusions are contrary to law, not supported by any evidence, and conflict with uncontradicted evidence.

• • • • • • •

5. The Commission erred in concluding that the February 17, 1954 agreement was action taken under a pre-existing contract and hence could not constitute a new contract. It has been shown heretofore that the 1954 agreement between Atlantic and Louisiana Natural was not taken pursuant to the pre-existing contract because the time for action thereunder had expired. But assuming, while denying, that such was the case, it does not follow

that the 1954 agreement was not a new contract. The fact that action is taken pursuant to a pre-existing contract merely creates, it does not solve, the problem as to whether such action results in a new contract or a continuation of the old one.

• • • • • • •

6. The Commission erred in referring (pp. 4-5) to the price provision in the Atlantic contract as being a price "redetermination" clause. This conclusion is contrary to the law and the contract itself. The price clause in the Atlantic contract is not a price "redetermination" clause. It is simply an agreement to agree.

7. The Commission erred as a matter of law in concluding (p. 5) that Condition XII of the Atlantic contract [fol. 149] makes it clear that where the parties are unable to agree, arbitration of the price dispute is assured. This conclusion disregards the clear meaning of Condition III that arbitration could not have been invoked unless the parties had attempted to reach agreement but failed to do so *at or before the beginning of the third five-year period, i.e., September 1, 1953.*

• • • • • • •

8. The Commission erred in finding (p. 5) it unnecessary to consider whether paragraph (b) of Condition III of the Atlantic contract is certain enough, and the Commission also erred in concluding that "paragraph (d) provides for a definite method by which a price will be fixed in case the parties fail to agree." For reasons heretofore given, arbitration could not have been invoked under the circumstances which Atlantic-Louisiana Natural found themselves in on September 1, 1953, the beginning of the third five-year period. Furthermore, even if the matter of price had gone to arbitration, the nature of the question to be arbitrated is such that no two of the three arbitrators may have ever agreed upon the same price, hence there is no definite standard to assure agreement as to price. Thus, a proper determination of this case is dependent

upon the meaning and legal effect of Condition III(b) and (c).

9. The Commission erred in relying upon the *Gammel, Anderson, Columbian Fuel* and *Baum* cases cited at page 5 of its order. The questions here involved were not raised as an issue in any of those cases. In none of those cases was there a provision such as Condition III(d) of the Atlantic contract that arbitration could only be invoked after certain conditions precedent had transpired within a given time. In none of those cases was there at issue the [fol. 150] question of whether an arbitration clause which required agreement of two of the three arbitrators was bound to make certain an agreement as to price when there could be no assurance that any two of the three arbitrators would ever agree upon the same price. And none of those cases involved application of the law of Louisiana, as we submit this case does, and under which even in the presence of an arbitration clause, no sale exists if the arbitrators cannot or be unwilling to make the estimation.

In the *Columbian Fuel* case, upon which the Commission appears to rely heaviest, a minimum 15¢ price assured a continuing contract even if the parties failed to agree upon a new price. In that case arbitration was for the purpose merely of ascertaining "reasonable market value" of the gas. No question was raised as to the efficacy of this provision. The matter there actually was submitted to arbitration and the arbitrators actually made an award. The suit was for judgment in accordance with the award. The facts and issues in that case are so completely different from the instant case, that it cannot have any precedental weight here.

10. The Commission erred in not holding this case to be governed solely by Louisiana law and in applying the law of the District of Columbia, and by assumption, the law of Texas.

Each of the contracts dealt with in this case relates to the sale and delivery in Louisiana of gas to be produced in that State. Nothing indicates that any law other than that of Louisiana is to apply. It would be unreasonable to assume that parties making a long-term contract dealing

with gas to be produced and delivered in Louisiana did [fol. 151] not intend that law to apply. The rule governing this case is announced by the Supreme Court in *Hall* v. *Cordell*, 142 U.S. 116, in which the court held that the forum must apply the law of the place of performance where there is nothing in the case to show that another law was intended.

11. To the extent the Commission did look to the law of Louisiana, it erred in failing to give effect to the last clause of LSA-CC Article 2465. This article relates to arbitration, and while it recognizes that price may be left to arbitration, it qualifies this exception to Louisiana's firm adherence to certainty of price as a requisite to a valid sale, by this condition:

> ". . . but if such person (arbitrator) can not, or be unwilling to make the estimation, *there exists no sale.*" (Emphasis supplied.)

• • • • • • •

16. The Commission erred in its finding (3), page 7, that Petitioner's effective June 7, 1954 rate is 8.997 cents. This finding is contrary to the law and the evidence.

17. The Commission erred in denying Petitioner's motion for oral argument and leave to file brief. It is apparent from the foregoing that the Commission was not fully advised as to the reasons why the decision of the Presiding Examiner should be affirmed. All parties but Petitioner filed exceptions to the Presiding Examiner's decision. Petitioner was not allowed to answer those exceptions and fully to develop the reasons why the conclusion reached by the Presiding Examiner was correct.

We most earnestly feel that there are several issues which we can no more than lightly touch upon in this application, which were not considered at all by the Com- [fol. 152] mission, and which upon being fully developed will require that the decision of the Presiding Examiner be affirmed.

Wherefore, Petitioner prays that a rehearing be granted and that this matter be set for oral argument, with the

right to file briefs, so that Petitioner's position can be fully presented to the Commission.

Respectfully submitted,

Oliver L. Stone, 3950 R.C.A. Building, 50 West 50th Street, New York 20, New York.

George C. Schoenberger, Jr., William W. Westerfield, Jr., Shell Oil Company, Shell Building, New Orleans, Louisiana, Attorneys for Petitioner, Shell Oil Company.

[fol. 153]

BEFORE THE FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman, Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

Docket No. G-12191

IN THE MATTER OF SHELL OIL COMPANY

ORDER DENYING REHEARING—Issued January 8, 1958

On December 11, 1957, Shell Oil Company filed an application for rehearing of our order issued November 12, 1957, in which we determined Shell's rate properly effective on June 7, 1954, for the sale of gas from the Chalkley Field, Cameron Parish, Louisiana, to Louisiana Natural Gas Corporation, later merged into Texas Gas Transmission Corporation.[1] The result of our determinations was that the charge for natural gas by Shell under its FPC Gas Rate Schedule No. 153 to Texas Gas, effective June 7, 1954, was 8.997 cents per Mcf at 15.025 psia excluding the one cent gathering tax. The bases for our decision were (1) that the 8.997 cents per Mcf charge was that actually paid as of June 7, 1954, rather than Shell's claimed contract charge of 12.5 cents and (2) that the charge of 8.997 cents

---

[1] We shall refer to the Buyer as Texas Gas to avoid confusion.

was not escalated under the provisions of Shell's contract with Texas Gas although Texas Gas had entered into a letter agreement for the purchase of gas at 12.5 cents per Mcf at 15.025 psia from The Atlantic Refining Company. It was our view that the letter agreement was entered into pursuant to a continuing basic contract between Atlantic [fol. 154] and Texas Gas' predecessors,[2] so that it would not "trigger" the escalation clause in Shell's contract as would a completely new contract between Texas Gas and a seller of natural gas, all as set forth fully in our previous order.

Shell in its application for rehearing objects to our conclusion that the actual rate paid on June 7, 1954, that is 8.997 cents per Mcf, is the effective rate on that date. Our reasoning on this proposition is set forth in the orders cited in our order of November 12, 1957, *Dorchester Corporation*, 14 F.P.C. ....., Docket No. G-6505, November 14, 1955, and *Phillips Petroleum Company*, 17 F.P.C. 503. We might note, however, that if Shell's filing on November 18, 1954, of its FPC Gas Rate Schedule No. 153 for service to Texas Gas is examined, its 1951 contract with Texas Gas in terms provided for the 8.997 cent rate, and the contemporaneous bill dated May 31, 1954, and filed with the contract was also issued on this basis. There was included with the November 18, 1954, filing a revised billing statement prepared later by Shell that made the claim for payment on the 12.5 cent basis with the notation that the matter was under negotiation. What was outstanding, as far as Shell is concerned, as of June 7, 1954, was therefore, a contract with a stipulated rate, and a billing in accordance with that rate. Later Shell claimed that an additional amount was owed. In our opinion, Shell's rate being charged on June 7, 1954, by its own action was 8.997 cents, and was the effective rate. As pointed out in our *Phillips Petroleum* order, *supra*, it would be administratively infeasible if we had to accept a rate subject to later claims that it was not the correct one. Shell also argues that the effec-

---

[2] Designated in the Commission's files as Atlantic's FPC Gas Rate Schedule No. 55.

[fol. 155] tive rate cannot be unilaterally changed by Texas Gas so that Shell is forever barred from receiving its contract price for the period commencing June 7, 1954. In our opinion the effective rate could have been changed by filing a rate increase at any time after June 7, 1954, as long as the rate increase filed was provided for in the contract between the parties, and was not disallowed by the Commission.

Shell also contends that we were incorrect in finding that the escalation clause in Shell's 1951 contract was not "triggered" by Texas Gas' letter agreement with Atlantic for increased rates dated February 17, 1954. Shell relies heavily in the provisions in Condition III of the original Atlantic contract which provides for a price to be agreed upon "at the beginning" of the renewal period arguing that this expression means that the agreement as to price in the renewal period, which began September 1, 1953, was required to have been made before the beginning of the period. We do not think that the parties intended to be so rigid in their relationships that they could not complete their negotiations after the beginning of the renewal period. In fact their language would indicate otherwise.

According to the contract, executed in 1943, it was to remain in effect for the life of the North Tepetate pool, but not to exceed 25 years. When the first five-year term of the contract expired September 1, 1948, agreement was not reached on the price until October 29, 1948, when a letter agreement was entered into with one of Texas Gas' predecessors covering six months of the second five-year period, followed by a more formal supplemental agreement dated February 16, 1949, with a succeeding buyer covering the balance of the second five-year period. As the second five-year period drew to a close, by letter dated August 27, 1953, Texas Gas' predecessor, Louisiana Natural, called the attention of Atlantic to the fact that the original contract provided for price redetermination for each five-[fol. 156] year period and notified Atlantic of its willingness to commence negotiations with respect to the price. When Atlantic and Texas Gas finally reached their agreement on February 17, 1954, covering the third five-year period commencing September 1, 1953, they recited they

were acting in accordance with Condition III of the original contract. There thus seems little doubt that the parties believed that they could complete their redetermination after the beginning of the third five-year period in question. It seems to us equally true that the actions of the parties carried out their intentions as expressed in the contract.

Shell argues with respect to arbitration that this procedure could not have been invoked unless the parties had attempted to reach an agreement but had failed to do so before the beginning of the renewal period on September 1, 1953. This argument, in effect, is that the contract lapsed by reason of the failure of the parties to attempt to reach an agreement prior to September 1, 1953. We find no reason in the terms of the contract or in the intention of the parties there expressed, to believe that there was any such lapse in the contract as claimed by Shell, and we believe that as confirmed by the actions of the parties themselves, the contract continued after such date.

Shell points to the possibility that the arbitrators, even if properly appointed, may not agree on a price. We must assume this is a possibility, but that does not mean that there exists no contractual right to go to arbitration in order to have the price determined. It may be true that if the arbitrators fail to achieve a result, there will exist "no sale" under the provisions of Article 2465 of the Louisiana Code, but that does not mean there exists no contract to determine the price by arbitration, and this contract is not invalid as the one in *Louis Werner Sawmill Co.* v. [fol. 157] *O'Shee*, 111 La. 817, 35 So. 919, cited by the parties and by us in our previous order. In that case arbitration could have been defeated by either party; in the present case each party is bound to the other by the arbitration clause which provides that "if one of said parties shall have failed to appoint an arbitrator within the time provided for herein, it is expressly understood and agreed that the sole arbitrator shall arbitrate the question alone." This, of course, achieves a result similar to that suggested by the French Commentator Marcadé, quoted by the Court in the *Werner* case, and in our previous order, to the effect that a sale would come about, in case of disagreement of

the parties, if the price were to be determined by experts to be appointed by the parties or alternatively by a judge. We therefore conclude that the Atlantic contract continued after September 1, 1953 as a binding obligation between the parties although subject to their later agreement as to price and, in case of their failure to agree, subject to the privilege of either or both parties invoking arbitration. Therefore the February 17, 1954 letter agreement between Atlantic and Texas Gas was not a new contract and did not "trigger" Shell's escalation clause.

We may add at this point that where Shell and its buyer did intend that escalations take place when prices were raised under either old or new contracts, language was used calculated to achieve this result, which may be compared with that used in Shell's contract with Texas Gas quoted in our previous order. While we do not wish to be considered as interpreting such language here, the contrast with the language used in Shell's contract with Texas Gas is significant. For instance in Shell's Gas Rate Schedule No. 4 it is provided:

> "If at any time or times the price per Mcf of gas or dry gas purchased by [the Buyer] from any gas pro- [fol. 158] ducer whomever . . . shall be greater than the price per Mcf of gas purchased hereunder, [the Buyer] will increase the price per Mcf payable to [Shell] for gas delivered hereunder. . . ."

In Shell's Gas Rate Schedule No. 7, it is provided:

> "Buyer agrees that if, during the term of this agreement, it purchases or agrees to purchase natural gas at any place within a distance of twenty-five (25) miles of the delivery point under the present contract, at a price or prices higher . . . than the prices provided for by the present contract, . . . it will, upon seller's request, thereafter pay to seller a price or prices under the present agreement not less than the higher price so being paid."

There are numerous other examples included in the present record.

Shell finally makes the point that it should have been permitted to argue orally and to answer the exceptions filed to the decision of the presiding examiner. We are of the opinion that Shell has had ample opportunity to get its views before us. After the completion of the hearing it filed a brief and a reply brief before the presiding examiner. Since the decision of the presiding examiner was favorable to it, Shell filed no exceptions, but upon our issuing an order contrary to its contentions, it has had opportunity and has filed an application for rehearing in accordance with Section 19(a) of the Gas Act. Oral argument is not a matter of right.

As we stated in our order issued October 24, 1957, in *Continental Oil Company*, 18 F.P.C. ....., Docket No. G-6346, Shell's objection seems to proceed from a misconception of the Commission's function on exceptions to a presiding examiner's decision. The Commission is not dependent upon a new round of briefs and oral arguments, nor is it limited to the issues raised by the exceptions. The [fol. 159] Administrative Procedure Act expressly provided that it shall "have all the powers which it would have in making the initial decision" (5 U.S.C. § 1007). Under the Natural Gas Act the presiding examiner is but the "representative of the Commission designated by it" (Natural Gas Act § 15(a)), not an independent agency or tribunal. On exceptions the Commission supersedes its agent and the full record including the transcript of the hearing, exhibits, etc., the briefs submitted before the presiding examiner, and the transcript of any oral argument before the presiding examiner, as well as the presiding examiner's report and exceptions thereto, are before the Commission. Part of the large number of copies of pleadings, exhibits, reporters' transcript, briefs, etc., required by the Commission rules is accounted for by the necessity of providing a set for each of the five members of the Commission at this stage of the proceeding. And beyond this, our rules are designed to make sure that every party shall completely argue its case, not holding back any contentions for a later round of briefs, by explicitly providing that (§ 1.31(c)) "no matter not included in the exceptions filed as provided

in this section may thereafter be objected to before the Commission upon brief or oral argument, or in an application for Commission rehearing."

Exceptions with supporting reasons are narrowly limited to what is necessary to bring into focus the issues remaining in controversy. There is no provision for briefs either in support of or in opposition to exceptions (§ 1.31(b)). The issues and the exceptions are considered upon the whole record, in the light of the original briefs, the transcript of any oral argument before the presiding examiner, and oral argument before the Commission itself, if such argument is had.

[fol. 160] As the court said in *N.L.R.B.* v. *Eclipse Lumber Co.*, 199 F. 2d 684, 686 (CA 9) we know of no right that Shell has to reply to exceptions. It had a further chance to place its viewpoint before us when it exercised its statutory right to file an application for rehearing in which it set forth its arguments in full with citations of authorities. As had been said, " * * * due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties." *Market Street Railway Co.* v. *Comm'n*, 324 U.S. 548, 562. "The requirements imposed by that guaranty are not technical, nor is any particular form of procedure necessary." *Inland Empire Council* v. *Millis*, 325 U.S. 697, 710.

The Commission finds:

The application for rehearing of our order issued November 12, 1957, in this proceeding, except as stated above, sets forth no new facts and no principles of law which either were not fully considered by the Commission when it issued that order or which having now been considered warrant any change in or modification of such order. All contentions and objections not specifically discussed or referred to herein have been considered and found either without basis in law or support in fact, and not sufficiently material to warrant individual treatment.

The Commission orders:

The application for rehearing filed by Shell on December 11, 1957, with respect to our order issued November 12, 1957, is hereby denied.

By the Commission.

Joseph H. Gutride, Secretary.

[fol. 161]

Docket No. G-12191

In the Matter of Shell Oil Company

Issued January 8, 1958

Connole, Commissioner, concurring in the result:

For the reasons set forth in my separate statement to the order of the Commission issued November 12, 1957, in this proceeding, the petition for rehearing sets forth good and sufficient reasons when it addresses itself to the question whether the rate schedule on file or the monies changing hands prescribes the effective and applicable rate. Indisputably it is contained in the rate schedule on file. Accordingly, I dissent from so much of this order that finds otherwise.

I concur in the reasoning contained in the balance of the order, however, and with the result reached.

William R. Connole

Jan -6, 1955

Shell Oil Company
RCA Building
50 West 50th Street
New York 20, New York

Attention: W. B. Golush, Manager
Head Office Gas Department

Gentlemen:

This is with reference to your letter of September 30, 1954, transmitting for filling with this Commission a contract dated May 1, 1951 with Louisiana Natural Gas Corpo- [fol. 162] ration, which you identify as your Rate Schedule 49. Accompanying this rate schedule is a bill setting forth a contract price of 12½¢ per Mcf purportedly charged during the month of May 1954, with a note that Shell claims the contract price to be 12½¢ per Mcf effective from September 1, 1953, but has received only 8.997¢ per Mcf, and the matter is now under negotiation with the purchaser.

A review of the contract filed as a rate schedule reveals no basis for charging any prices other than 8.997¢ per Mcf. In this connection your attention is directed to Section 4(c) of the Natural Gas Act which requires the filing of schedules showing "all rates and charges" for any sale subject to the jurisdiction of the Commission. If the claimed price of 12½¢ per Mcf is based upon some document other than the contract tendered for filing, to complete your rate schedule, such other document should be filed with the Commission; or if no other document exists, a complete statement of the basis for the ½¢ per Mcf price should be filed. Pending receipt of your advice in this matter, no further action will be taken with respect to your filing of the subject rate schedule.

A copy of this letter is being forwarded to Louisiana Natural Gas Corporation for its comment.

Very truly yours,

Leon M. Fuquay, Secretary.

Rates

CGD:hh
1-3-55

copy to Louisiana Natural Gas Corp., P.O. Box 1299, Pioneer Building, Lake Charles, Louisiana.

[fol. 163]

EXHIBIT "B"

I.

Quality of Gas

1. The gas delivered hereunder shall be merchantable natural gas, at all times complying with the requirements as to purity expressed in this contract.

(a) The gas to be delivered hereunder shall have a gross heating value of not less than one thousand (1000) British thermal units per cubic foot. In the event that the total heating value of the gas per cubic foot in any month falls below one thousand (1000) British thermal units per cubic foot, Buyer shall have the option (i) to refuse to accept said gas so long as said total heating value remains below one thousand (1000) British thermal units per cubic foot, or (ii) may continue to accept delivery of said gas, in which case, a reduction shall be made in the total amount which Buyer would otherwise pay for such month if the total heating value were one thousand (1000) British thermal units or above. Such reduction shall be determined by multiplying said amount so otherwise payable by a fraction, the numerator of which is the deficieney in total heating value per cubic foot below one thousand (1000) British thermal units and the denominator of which is one thousand (1000). Such reduction shall be reflected on the bill rendered for such month and the net amount is the total amount to be paid by Buyer for such month.

(b) The gas to be delivered hereunder shall be commercially free from dust, gums, gum-forming constitu-

[fol. 164] tents, gasoline, water or any other substance of any kind which may become separated from the gas in the course of transportation through Buyer's pipeline at a pressure of one thousand (1000) pounds and a temperature of 120° Fahrenheit. All gas delivered hereunder, which may be dehydrated by Seller, shall in no event have a water content in excess of six and two-tenths (6.2) pounds of water per million cubic feet of gas measured at a pressure base of 15.025 pounds per square inch and at a temperature of sixty (60) degrees Fahrenheit as determined by dew point apparatus approved by the Bureau of Mines.

(c) The gas to be delivered hereunder shall not contain more than one (1) grain of Hydrogen Sulphide per one hundred (100) cubic feet as determined by quantitative test after presence of Hydrogen Sulphide has been indicated by qualitative test, which shall consist of exposing a strip of white filter paper freshly moistened with a solution of one hundred (100) grains of lead acetate in one hundred (100) cubic centimeters of water, to be exposed to the gas for one and one-half (1½) minutes in an apparatus previously purged, through which the gas is flowing at the rate of approximately five (5) cubic feet per hour, the gas not impinging from the jet upon the test paper, and which qualitative test shall be deemed to be satisfied if, after this exposure, the test paper is found not distinctly darker than a second paper freshly moistened with a similar solution and not exposed to the gas. The gas to be delivered hereunder shall not contain more than twenty [fol. 165] (20) grains of total sulphur per one hundred (100) cubic feet.

(d) The gas shall not contain in excess of three percent (3%) by volume of carbon dioxide nor more than one percent (1%) by volume of oxygen.

(e) The temperature of the gas to be delivered hereunder shall not be in excess of one hundred twenty degrees (120°) Fahrenheit.

II.

Measurements

1. (a) The sales unit of the gas deliverable under this agreement shall be one thousand (1000) cubic feet.

(b) The volume of gas delivered by Seller hereunder shall be measured at the orifice meters of Buyer at the point or points of delivery which, together with any buildings and all other collateral equipment required for the determination of volume, Buyer agrees at its expense to install, maintain and operate at the point or points of delivery. Orifice meters shall be installed and operated and volumes computed in accordance with American Meter Company Bulletin E2 (1936).

(c) The unit of volume for the purpose of measurement shall be one (1) cubic foot of gas at a temperature base of sixty (60) degrees Fahrenheit, and at a pressure of fifteen and twenty-five thousandths (15.025) pounds absolute. It is agreed that the gas shall be [fol. 166] measured according to Boyle's Law for the measurement of gas under varying pressures with corrections for deviations therefrom determined as provided in subparagraph (d) below.

(d) The deviation of the gas from Boyle's Law shall be determined by tests at intervals of three (3) months or at such other intervals as are found necessary in practice. The apparatus and the method to be used in making said tests shall be in accordance with the recommendations of the National Bureau of Standards of the Department of Commerce or any other mutually agreed upon method. Each test shall determine the correction to be used in computing the volume of natural gas delivered until the next test.

(e) The temperature of the gas flowing through the meter or meters shall be determined by the continuous use of a recording thermometer of standard manufacture installed by the Buyer and acceptable to the Seller

and so installed that it may properly record the temperature of the gas flowing through the meter or meters. The arithmetical average of the 24-hour record, or of so much of the 24 hours as gas has been passing if gas has not been passing during the entire period, from the recording thermometer shall be deemed to be the gas temperature for the day and shall be used to make the proper corrections in volume computations.

(f) The specific gravity of the gas delivered hereunder shall be determined once each month by a gravity balance of standard manufacture or, at the option of the Buyer, by the use of a recording type gravitometer to be installed, maintained and operated by Buyer at [fol. 167] the point or points of delivery. If monthly determinations are made, the latest determination shall be used for the ensuing month but if a recording gravitometer be installed, then the arithmetical average of the hourly specific gravity recorded during each twenty-four (24) hour period shall be used to make proper correction in volume computations to a specific gravity of six tenths (0.6).

(g) The gross heating value per cubic foot of the gas at a temperature of sixty degrees (60°) Fahrenheit, saturated with water vapor, and at an absolute pressure equivalent to thirty (30) inches of mercury at thirty-two degrees (32°) Fahrenheit shall be determined from time to time by Buyer or at the request of the Seller either (i) by a manually operated calorimeter of a type approved by the United States Bureau of Standards and operated in accordance with the methods recommended by said bureau or (ii) at the option of the Buyer, by a recording calorimeter of an approved type installed at the point or points of delivery, operated and maintained by the Buyer at its own expense, in which case the gross heating value of the gas delivered each day shall be determined by the arithmetical average of the daily records of such recording calorimeter.

(h) Seller may install, maintain, operate and remove such check measuring equipment as it desires, provided that such check meters and equipment shall be so installed as not to interfere with the operation of meters through which Seller delivers gas at or near [fol. 168] the point or points of delivery.

(i) In the event any measuring equipment is out of service or registering inaccurately, the volume of gas delivered hereunder shall be estimated (a) by using the registration of any check measuring equipment if installed and accurately registering, or, in their absence, (b) by correcting the error if the percentage of error is ascertained by calibration test or mathematical calculation, or, if neither such method is feasible, (c) by estimating the quantity of delivery by deliveries during a period under similar conditions when the measuring equipment was registering accurately.

(j) From time to time and at least once a month, on a date as near the first of the month as practicable, the accuracy of Buyer's measuring equipment shall be verified in the presence of representatives of both Seller and Buyer and the parties shall jointly observe any adjustments which are made in such measuring equipment. If either party at any time shall notify the other that such party desires a special test of any meter, the other party shall cooperate to secure an immediate verification of the accuracy of the measuring equipment and joint observation of any adjustments. Each party shall give to the other notice of the time of all tests of meters reasonably in advance of the holding of tests in order that the other party may conveniently have its representative present.

[fol. 169] (k) If, upon any test, any measuring equipment is found to be no more than two percent (2%) fast or slow, previous readings of such equipment shall be considered correct in computing the deliveries of gas hereunder, but such equipment shall be adjusted at once to read accurately. If, upon test any measuring equipment shall be found to be inaccurate by an amount

exceeding two percent (2%) at a reading corresponding to the average rate of flow for the period since the last preceding test, then any previous readings of such equipment shall be corrected to zero error for any period which is known definitely or agreed upon. But in case the period is not known definitely or agreed upon, such correction shall be for a period extending over one-half of the time elapsed since the date of the last test not exceeding a correction period of sixteen (16) days.

(l) Buyer and Seller shall have the right to be represented at and to participate in all tests of gas delivered hereunder or of any equipment used in measuring or determining the nature or quality of such gas and to inspect at any time during business hours any and all equipment of Buyer used for the measurement or determination of the nature or quality of gas delivered hereunder.

(m) All test data, charts and other similar record shall be preserved by Buyer for a period of at least six (6) years and shall on the request of the Seller be sent to the Seller for inspection at all reasonable times.

[fol. 170]

III.

Billing and Payment

1. (a) Buyer agrees to pay to Seller, on or before the 20th day of each calendar month, for all gas delivered under the terms hereof during the preceding calendar month.

(b) All sums due for gas which Buyer was obligated to purchase and pay for but failed to take during any period of twelve (12) successive calendar months shall be paid by Buyer on or before the 20th day of the first succeeding calendar month after such twelve month period. If, during the next succeeding twelve (12) month period, Buyer shall take in excess of the minimum quantity of gas required to be taken during such period, Buyer shall be entitled to a credit against

such excess for the gas paid for but not taken during the preceding twelve (12) successive calendar months.

(c) Should Buyer fail to pay for the total quantity of gas required to be purchased by Buyer hereunder in accordance with the provisions of this contract, interest on the unpaid amount so due shall accrue at the rate of six percent (6%) per annum. If such default in payment continues for thirty (30) days after written notice from Seller to Buyer, Seller may, in addition to all other rights and remedies, suspend deliveries of gas hereunder and/or terminate this contract by giving Buyer written notice of such termination. In the event any error is discovered in the amount billed in any statement of Buyer, such error shall be adjusted within [fol. 171] thirty (30) days of determination thereof, provided that claim therefor shall have been made within ninety (90) days from the date of discovery of such error, but in any event within two (2) years from the date of such statement.

(d) All books of account and similar records bearing upon the amount of gas delivered and the amount of gas which Buyer is obligated to purchase hereunder and the amount due therefor shall be preserved by the Buyer for a period of at least six (6) years and shall, at the request of Seller, be made available for inspection by Seller at all reasonable times.

IV.

Regulatory Bodies

1. This contract shall be subject to all valid applicable state and federal laws, rules and regulations. All such laws, rules and regulations shall be presumed by both parties to be valid unless and until a court of competent jurisdiction shall hold otherwise with respect thereto.

V.

Force Majeure

1. In the event of any party being rendered unable, wholly or in part, by force majeure or other causes herein

specified, to carry out its obligations under this contract, it is agreed that on such party's giving notice and reasonably full particulars of such force majeure in writing or by telegraph to the other parties within a reasonable time [fol. 172] after the occurrence of the cause relied on, then the obligations of the party giving such notice, so far as and to the extent that they are affected by such force majeure or other causes herein specified, shall be suspended during the continuance of any inability so caused, but for no longer period, and such cause shall so far as possible be remedied with all reasonable dispatch.

The term "force majeure" as used herein shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests, and restraints of the government, either federal or state, civil or military, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, freezing of wells or lines of pipe, temporary failure of gas supply, inability of any party hereto to obtain necessary materials, supplies or permits, due to existing or future rules, regulations, orders, laws or proclamations of governmental authorities (both federal and state), including both civil and military, any act or omission on the part of any purchaser or purchasers of gas from Buyer by reason of force majeure affecting such purchaser or purchasers, and any other causes, whether of the kind herein enumerated or otherwise, which are not reasonably within the control of the party claiming suspension. It is understood and agreed that the settlement of strikes or lockouts shall be entirely within the discretion of the party having the difficulty, and that the above requirement that any force majeure shall be remedied with all reasonable dispatch [fol. 173] shall not require the settlement of strikes or lockouts by acceding to the demands of opposing party when such course is inadvisable in the discretion of the party having the difficulty.

[fol. 174]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,568

SHELL OIL COMPANY, Petitioner,

—v.—

FEDERAL POWER COMMISSION, Respondent,

TEXAS GAS TRANSMISSION CORPORATION, Intervenor,

and

LOUISVILLE GAS & ELECTRIC COMPANY, Intervenor.

On Petition to Review an Order of the Federal Power Commission

---

Argued October 6, 1958

Before GOODRICH, McLAUGHLIN and STALEY, *Circuit Judges.*

OPINION OF THE COURT—Filed January 27, 1959

By McLAUGHLIN, *Circuit Judge.*

This case is another in that line wherein the issue has been the effective rate on June 7, 1954 for natural gas sold [fol. 175] by a so-called independent producer. That date was when the Supreme Court announced its decision in Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954). The effect of that decision was to subject independent producers of natural gas to regulation by the Federal Power Commission. The Commission, in implementing the decision, called for filing of rate schedules setting forth " • • • rates • • • effective on June 7, 1954."

What that rate was for Shell Oil Company in its contract with Louisiana Natural Gas Company[1] depends upon the contract-established provisions rather than on the fortuity of rates which were being actually paid on that date. See Natural Gas Pipeline Company v. Federal Power Commission, 253 F.2d 3, (3 Cir. 1958), cert. den. 357 U.S. 927 (1958). The contract had been entered on May 1, 1951 and for the period in question provided for the sale of gas at 8.997¢ per Mcf, unless " * * * at any time after December 31, 1951, Buyer [Louisiana] * * * [should] enter into a contract providing for the purchase by it of gas * * * " produced and delivered within a fifty mile radius of any delivery point specified. In that event the contract price was to escalate to the same price as that called for by the subsequent contract with the other producer.

Louisiana had already succeeded to rights as purchaser under a contract entered with Atlantic Refining Company, another producer, in 1943. Under that contract buyer agreed to buy specified daily quantities of gas; it was provided that the rights of the parties should continue for the producing life of the field involved but for not more than twenty-five years. In that contract the buyer agreed to pay 2.2¢ net per Mcf for gas received for the first five years. No fixed price was established for periods after that, but rather the contract provided:

> [fol. 176] "(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.
>
> "(c) During succeeding five-year periods, price to be paid will be determined at the beginning of each

[1] Louisiana Natural Gas Company was a subsidiary of Texas Gas Transmission Corporation. On June 30, 1955 it was merged into the parent corporation.

period in the same manner as provided for in paragraph (b) above.

"(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII."[2]

A price for the second five year period had been agreed to by negotiation between the buyer and seller, but this agreement expired on August 31, 1953. Louisiana and Atlantic undertook negotiations in September of that year for agreeing to a price for the third five year period.

[fol. 177] The parties had difficulty in agreeing. The negotiations consumed five and a half months, finally culminating in an agreement dated February 17, 1954, whereby the price was established at 12.5¢ per Mcf, plus gathering tax. Shell thereafter accidentally learned of this and subsequently notified Louisiana that it felt entitled under its contract to an escalation of its price to the same 12.5¢ level.

---

[2] Condition XII reads:

"* * * The party desiring such arbitration shall notify the other and in such notice shall name an arbitrator, (sic) the arbitrator to be appointed by the other party shall be named within ten (10) days after receipt of such notice of arbitration, and an additional arbitrator shall, within ten (10) days of the appointment of the second arbitrator, be selected by the two (2) arbitrators theretofore appointed, but if one of said parties shall have failed to appoint an arbitrator within the time provided herein, it is expressly understood and agreed that the sole arbitrator shall arbitrate the question alone. If arbitrators shall have been appointed by the respective parties and shall have failed to select the third arbitrator within the above stated time, the third arbitrator shall be appointed by the senior Judge of the 5th Federal Judicial Circuit upon application therefor by either of said parties to the arbitration.

"* * * The decision in writing signed by a majority of the arbitrators shall be final and conclusive with respect to the matter submitted and the parties hereto agree to accept and abide by the same."

There is no dispute that the fifty mile radius requirement of the Louisiana-Shell contract is satisfied. The argument concerning Shell's right to a higher price turns on whether the Louisiana-Atlantic agreement of February, 1954 was an "entering of a contract" which activated the price escalation clause of the Louisiana-Shell contract.

When Shell filed its rate schedule with the Federal Power Commission pursuant to the Commission's orders implementing the Phillips decision, the Commission neither accepted or rejected the submitted rate, pending further explanation by Shell of why it claimed 12.5¢ per Mcf. Shell presented that explanation in February, 1957 when it filed for an increase in rate to 16.75¢ per Mcf. The reasonableness of that rate is still awaiting hearing. The Commission at this point directed that a hearing be held to determine the effective rate on June 7, 1954 under the Shell contract which it simultaneously accepted for filing.

As a result of the hearing the examiner found the effective rate to be 12.5¢. This finding was subsequently reversed on November 12, 1957, by the Commission whose decision is here on appeal by Shell.

The clause in the Louisiana-Shell contract which is central to this controversy is one of the type commonly referred to in the trade as a "most favored nation" clause. The usual objective of such a clause is to assure the seller a top price for its gas. Testimony at the hearing before the Commission's examiner was that Louisiana had desired a twenty year contract which was for a term longer than Shell had at that time ever contracted for, at least in that area. Because of difficulty in establishing a price for so [fol. 178] long a period, the clause in question was agreed upon. It appears that at the time of contracting Shell knew Louisiana was purchasing gas from Atlantic but was not familiar with the specific terms of that contract. These facts tend strongly to demonstrate that the intention of the parties was for any higher price paid by Louisiana to another producer to trigger a rise on the Shell contract to the same figure except possibly where a pre-existing contract already provided for a settled step-up in price.

If the precise arrangement under the Atlantic contract had been known to Shell, then perhaps Louisiana could

argue to more purpose that the wording of the Shell contract (which calls for the "enter[ing of] a contract providing for the purchase * * * of gas") was not intended to trigger escalation following an agreement on price when that agreement was reached under an earlier gas purchase contract which contained a binding agreement subsequently to agree on price. But even then the fact cannot be avoided that, at least for purposes of the favored nation clause, the "entering of a contract for the purchase of gas" has not been accomplished until the price has been established. True, Atlantic was obligated to deliver gas for twenty years from 1943 but, just as important, Louisiana was bound to pay for it. And while there may have been enforceable means for settling the rate of payment in the event the parties could not agree, it would nonetheless be true that it was when the price was finally established, by whatever means, that a contract had thereupon been entered. Actually, if the Louisiana-Atlantic agreement of February 17, 1954, was not an entering of a contract we are at a loss as to how it would be properly and legally characterized. The situation fits best into the rubric of an accord itself taken as satisfaction. See 6 Williston on Contracts, §§ 1841, 1846 (rev. ed. 1938). Both parties gave up their rights under the original contract to proceed to arbitration, promising on the one side to pay and on the other side to accept the price reached.

[fol. 179] To make the date of the accord retroactive to the date of the original agreement-to-agree is, of course, abstractly conceivable; but for a court to attribute that effect to the Atlantic contract and apply it to the Shell contract in the absence of recognition of this possibility in the Shell contract would take the law out of the realm of business practicalities. It is far more in line with the realities of the situation to say that complete performance of the 1943 contract required the parties to enter into subsequent contracts. The entering into one of those subsequent contracts triggered the escalation clause in the Shell agreement.

We have assumed without deciding that the Atlantic contract of 1943 did in fact impose a binding agreement-

to-agree on the price for gas in each of the contract's last four five year periods. Thus it has not been necessary to determine the several questions raised in connection with the arguments directed to that phase of the case. Of course if the Atlantic contract of 1943 was not a binding agreement-to-agree, that circumstance alone would place the February, 1954 Atlantic contract fully within the terms of the escalation clause in the Shell contract.

The Federal Power Commission order of November 12, 1957 finding Shell's rate with Louisiana on June 7, 1954 to be 8.997¢ per Mcf will be vacated. Because the escalation called for by the contract requires consideration of other factors in determining whether the price to another supplier was indeed higher, the cause will be remanded for consideration of those factors.

[fol. 180] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,568

SHELL OIL COMPANY, Petitioner,

—v.—

FEDERAL POWER COMMISSION, Respondent,

TEXAS GAS TRANSMISSION CORPORATION, Intervenor,

LOUISVILLE GAS & ELECTRIC COMPANY, Intervenor.

JUDGMENT—January 27, 1959

Present: GOODRICH, MCLAUGHLIN and STALEY, Circuit Judges.

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of November 12, 1957 of the Federal Power Commission be, and it is hereby vacated, and the cause remanded with directions to proceed in conformity with the opinion of this Court.

January 27, 1959

[fol. 181] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,568

SHELL OIL COMPANY, Petitioner,

—v.—

FEDERAL POWER COMMISSION, Respondent,

TEXAS GAS TRANSMISSION CORPORATION, Intervenor,

and

LOUISVILLE GAS & ELECTRIC COMPANY, Intervenor.

Present: GOODRICH, McLAUGHLIN and STALEY, Circuit Judges.

ORDER DENYING PETITIONS FOR REHEARING—March 4, 1959

The petitions for rehearing of Federal Power Commission, Texas Gas Transmission Corporation and Louisville Gas & Electric Company in this case are denied.

By the Court,

McLaughlin, Circuit Judge.

Dated: March 4, 1959.

[fol. 182] Clerk's certificate to foregoing transcript (omitted in printing).

[fol. 183]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1958.

TEXAS GAS TRANSMISSION CORPORATION and LOUISVILLE GAS AND ELECTRIC COMPANY, Petitioners,

—v.—

SHELL OIL COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—May 25, 1959

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 2, 1959.

William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States.

Dated this 25th day of May, 1959.

[fol. 185]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1958.

FEDERAL POWER COMMISSION, Petitioner,

—v.—

SHELL OIL COMPANY, TEXAS GAS TRANSMISSION CORPORATION, and LOUISVILLE GAS & ELECTRIC COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—May 25, 1959

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 2, 1959.

William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States.

Dated this 25th day of May, 1959.

[fol. 187]

SUPREME COURT OF THE UNITED STATES

No. 167, October Term, 1959

TEXAS GAS TRANSMISSION CORPORATION, et al., Petitioners,

—v.—

SHELL OIL COMPANY

ORDER ALLOWING CERTIORARI—October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with No. 170 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 189]

SUPREME COURT OF THE UNITED STATES

No. 170, October Term, 1959

FEDERAL POWER COMMISSION, Petitioner,

—v.—

SHELL OIL COMPANY

ORDER ALLOWING CERTIORARI—October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with No. 167 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

2. That "the fact cannot be avoided that, *at least for purposes of the favored nation clause,* the 'entering of a contract for the purchase of gas' has not been accomplished until the price has been established."

3. That, although the Commission's conclusion was "abstractly conceivable", such a conclusion would take the law out of the "realm of business practicalities" and that it was more in line with the "realities of the situation" to say that complete performance of the 1943 Atlantic contract required the parties to enter into subsequent contracts.*

Reasons for Granting the Writ

1. Important Question With a Dangerous Impact upon the Consuming Public, the Commission and other Agencies

The Commission is often required to interpret various agreements committed to regulation. Here presented is the first decision by the full Commission interpreting the meaning of a rate schedule of an independent producer of natural gas, as required by the Court's *Phillips* decision (347 U. S. 672). Over 10,000 such rate schedules are now on file, and over 6,000 rate increase filings have been submitted, each one proceeding on the theory that the rate increase is authorized under the terms of the contract. The Commission is entering an era when questions of interpreting rate schedules of independent producers are arising with increasing frequency.**

---

* The Court of Appeals did remand the case to the Commission, but solely on the issue of whether the price paid by Texas Gas to Atlantic was in fact "higher" when various factors are taken into account as required by the escalation section (App. A., p. 6a).

** In addition to the numerous proceedings in which disputes over interpretation will undoubtedly arise at time of hearing, the following are 26 illustrative cases where such issues are already

KEY TO BRIEFS

1 PETITION FOR A WRIT OF CERTIORARI

2 PETITION FOR A WRIT OF CERTIORARI

3 BRIEF OF SHELL OIL COMPANY IN OPPOSITION.

4 PETITIONERS' REPLY BRIEF

5 BRIEF FOR PETITIONERS TEXAS GAS TRANSMISSION CORPORATION AND LOUISVILLE GAS AND ELECTRIC COMPANY

6 BRIEF FOR THE FEDERAL POWER COMMISSION

7 BRIEF OF SHELL OIL COMPANY.

8 REPLY BRIEF FOR PETITIONERS TEXAS GAS TRANSMISSION CORPORATION AND LOUISVILLE GAS AND ELECTRIC COMPANY

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 1 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 167

TEXAS GAS TRANSMISSION CORPORATION and LOUISVILLE GAS AND ELECTRIC COMPANY,

Petitioners,

v.

SHELL OIL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MATHIAS F. CORREA
63 Wall Street,
New York 5, New York,
Counsel for Texas Gas Transmission Corporation.

GAVIN H. COCHRAN
713-723 Kentucky Home Life Building,
Louisville 2, Kentucky,
Counsel for Louisville Gas and Electric Company.

ARTHUR L. CORBIN
Yale Station,
New Haven, Connecticut,

CHARLES F. DETMAR, JR.,
LAWRENCE W. KEEPNEWS
63 Wall Street,
New York 5, New York,
Of Counsel.

July 1, 1959

INDEX

	PAGE
OPINION AND ORDERS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
1. Important Question with a Dangerous Impact upon the Consuming Public, the Commission and other Agencies	6
2. Trial De Novo A Serious Departure From Proper Scope of Review Proceedings	9
The Court May Not Substitute Its Interpretation of the Rate Schedule For That of the Commission	9
Reviewing Court Has No Power to Find Facts	10
3. Court's De Novo Interpretation Revised the Rate Schedule	12
Atlantic Price Redetermination Is Not Entry into a Contract	14
CONCLUSION	17
APPENDIX A—Opinion, Judgment and Order Denying Rehearing Below	
APPENDIX B—Section 19(b) of the Natural Gas Act	
APPENDIX C—Section 10(e) of the Administrative Procedure Act	

finding is one exclusively reserved or delegated to the Commission.*

As precisely summarized in *Florida* v. *United States*, 282 U. S. 194, 215:

> "In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. *The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission* but to ascertain whether its findings are properly supported."

To the same effect: *SEC* v. *Chenery Corp.*, 318 U. S. 80, 88; *FTC* v. *Algoma Lumber Co.*, 291 U. S. 67, 73; *Crolley* v. *Tatton*, 249 F. 2d 908, 911 (5th Cir. 1957), *cert. denied*, 356 U. S. 966; *Morand Bros. Beverage Co.* v. *NLRB*, 204 F. 2d 529, 532 (7th Cir. 1953), *cert. denied*, 346 U. S. 909; *Willapoint Oysters, Inc.* v. *Ewing*, 174 F. 2d 676, 685-86, 689 (9th Cir. 1949), *cert. denied*, 338 U. S. 860; *Saginaw Broadcasting Co.* v. *FCC*, 96 F. 2d 554, 563 (D. C. Cir. 1938), *cert. denied*, 305 U. S. 613.

The Court has noted that Section 19(b) of the Natural Gas Act (App. B) is one of the statutes prohibiting the Court of Appeals from making findings. *Colorado-Wyoming Gas Co.* v. *FPC*, 324 U. S. 626, 634.

Of course, the stern prohibition against court-made findings applies where the question involves the proper interpretation of a rate schedule. The need for an exercise of

---

* Thus, even when the administrative agency for any reason does not make pertinent findings in the first instance, the court's power is limited to remanding the case to the agency to permit it to make the requisite findings. *FPC* v. *Idaho Power Co.*, 344 U. S. 17, 20; *Sunray Mid Continent Oil Co.* v. *FPC*, 353 U. S. 944. The Congressional policies underlying this separation of power are too familiar to require extended repetition.

Citations

Cases

	PAGE
Brassert v. *Clark*, 162 F. 2d 967 (2d Cir. 1947)	15
Cities Service Gas Producing Co. v. *FPC*, 233 F. 2d 726 (10th Cir. 1956), *cert. denied*, 352 U. S. 911	15
Colorado-Wyoming Gas Co. v. *FPC*, 324 U. S. 626	11
Col-Tex Refining Co. v. *Coffield & Guthrie, Inc.*, 196 F. 2d 788 (5th Cir. 1952)	13
Crolley v. *Tatton*, 249 F. 2d 908 (5th Cir. 1957), *cert. denied*, 356 U. S. 966	11
FPC v. *Idaho Power Co.*, 344 U. S. 17	11
FTC v. *Algoma Lumber Co.*, 291 U. S. 67	11
FTC v. *Sewell*, 353 U. S. 969	7
Florida v. *United States*, 282 U. S. 194	11
May Metropolitan Corp. v. *May Oil Burner Corp.*, 290 N. Y. 260, 49 N. E. 2d 13 (1943)	15
McKell v. *Chesapeake & O. Ry.*, 175 Fed. 321 (6th Cir. 1910), *cert. denied*, 220 U. S. 613	15
Morand Bros. Beverage Co. v. *NLRB*, 204 F. 2d 529 (7th Cir. 1953), *cert. denied*, 346 U. S. 909	11
Old Colony Trust Co. v. *Omaha*, 230 U. S. 100	12
Phillips Petroleum Co. v. *Wisconsin*, 347 U. S. 672	3, 6
Phillips Petroleum Co. v. *FPC*, 227 F. 2d 470 (10th Cir. 1955), *cert. denied*, 350 U. S. 1005	15
Phillips Petroleum Co. v. *FPC*, 258 F. 2d 906 (10th Cir. 1958)	10
Red Cross Line v. *Atlantic Fruit Co.*, 264 U. S. 109	13
Saginaw Broadcasting Co. v. *FCC*, 96 F. 2d 554 (D. C. Cir. 1938), *cert. denied*, 305 U. S. 613	11
SEC v. *Chenery Corp.*, 318 U. S. 80	11
Simpson Bros. v. *District of Columbia*, 179 F. 2d 430 (D. C. Cir. 1949), *cert. denied*, 338 U. S. 911	13
Sunray Mid Continent Oil Co. v. *FPC*, 353 U. S. 944	11
Texas Co. v. *Z. & M. Independent Oil Co.*, 156 F. 2d 862 (2d Cir. 1946)	13

PAGE

United Gas Pipe Line Co. v. *Memphis Light, Gas and Water Div.*, 358 U. S. 103 ..... 9, 13, 16
United States v. *ICC*, 198 F. 2d 958 (D. C. Cir. 1952), *cert. denied*, 344 U. S. 893 10
United States v. *Western Pacific R. R.*, 352 U. S. 59 12
Willapoint Oysters, Inc. v. *Ewing*, 174 F. 2d 676 (9th Cir. 1949), *cert. denied*, 338 U. S. 860 11

COMMISSION PROCEEDINGS

Amerada Petrol. Co. (Docket No. G-16117) 7
Atlantic Ref. Co. (G-18565) 7
Atlantic Ref. Co. (G-18752) 7, 8
F. G. Blackwood (G-18515) 7
Cabot Carbon Co. (G-18842) 7
Cabot Carbon Co. (G-18844) 7
Continental Oil Co. (G-18566) 7
J. L. Hamon (G-18327) 7
Herd O. & G. Co. (G-18769) 7
Hassie Hunt Trust (G-18093) 7, 8
H. L. Hunt (G-18092) 7, 8
H. L. Hunt (re Sched. Nos. 6 & 15) 7
Hunt Oil Co. (G-18668) 7
W. H. Hunt Trust Estate (G-18091) 7, 8
Monterey Oil Co. (G-18568) 7
Peerless O. & G. Co. (G-18701) 7
Phillips Petrol. Co. (G-1148) 7
Phillips Petrol. Co. (G-10908) 7
Phillips Petrol. Co. (G-14115) 7
Pure Oil Co. (G-17930) 7, 8
Sinclair Oil & Gas Co. (G-18326) 7
Shell Oil Co. (G-18845) 7
G. Stratton, Jr. (G-18692) 7
Warren Petrol. Corp. (G-18467) 7
Warren Petrol. Corp. (G-18517) 7
Warren Petrol. Corp. (G-18560) 7

Statutes

	PAGE
62 Stat. 928, 28 U. S. C. §1254 (1)	2
Natural Gas Act, Section 19(b), 52 Stat. 831 (as amended, 72 Stat. 947), 15 U. S. C. A. §717r(b) (Supp. 1958)	2, 3
Administrative Procedure Act, Section 10(e), 60 Stat. 243, 5 U. S. C. §1009(e)	3

Regulations

FPC Regulations Under the Natural Gas Act, 18 C. F. R. §§154.92-94 (Supp. 1958)	3

Article and Treatises

Jaffe, *Judicial Review: Question of Fact*, 69 Harv. L. Rev. 1020 (1956)	7
5 Williston, *Contracts* §574 (rev. ed. 1937)	13
5 Williston, *Contracts* §1421 (rev. ed. 1937)	13
6 Williston, *Contracts* §1921A (rev. ed. 1938)	13
1 Williston, *Sales* §176 (rev. ed. 1948)	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. .....

TEXAS GAS TRANSMISSION CORPORATION and LOUISVILLE GAS AND ELECTRIC COMPANY,

Petitioners,

v.

SHELL OIL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Texas Gas Transmission Corporation (Texas Gas) and Louisville Gas and Electric Company (Louisville) pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on January 27, 1959.

A petition for a writ of certiorari is also being filed on behalf of the Federal Power Commission (Commission).

Opinion and Orders Below

The opinion of the Court of Appeals (App. A hereto) is reported at 263 F. 2d 223. The order of the Commission (R.

2116-25*) appears at 18 F. P. C. 617, 22 P. U. R. 3d 94; its denial of rehearing (R. 2149-54) is reported at 19 F. P. C. 74, 22 P. U. R. 3d 101.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on January 27, 1959 (App. A, p. 7a).

Timely petitions for rehearing were filed and were denied by the Court of Appeals by order dated March 4, 1959 and entered March 5, 1959 (App. A, p. 8a). By order of Mr. Justice Brennan dated May 25, 1959, the time for filing this petition was extended to and including July 2, 1959.

The jurisdiction of the Court is invoked under 62 Stat. 928, 28 U. S. C. §1254(1) and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (as amended, 72 Stat. 947), 15 U. S. C. A. §717r(b) (Supp. 1958).

Questions Presented

In reversing a Commission order interpreting a gas purchase contract filed as a rate schedule under the Natural Gas Act, the Court of Appeals made its own independent and final interpretation. In the process of its decision, that court made de novo findings of extrinsic facts, such as subjective intention and business practicalities, none of which had been passed upon by the Commission.

The questions presented are:

1. May the reviewing court

   a. Interpret anew the meaning of a rate schedule, or is it limited to a determination of whether the Com-

---

* Record references (other than to the opinion of the Court of Appeals printed as App. A) are to the pages of the original record before the Commission. Those page numbers are prominently shown in the Joint Appendix in the court below which is being filed with this Petition.

mission's interpretation is supported by evidence and has warrant in law?

b. Make independent findings of fact or an evaluation of industry practice and usage?

2. When a gas rate schedule limits "favored-nation" rate increases to higher prices paid under gas purchase contracts entered into subsequent to its date, does a price redetermination—made under a contract entered into prior to that date—fall within that limitation?

Statutes Involved

The statutes involved are Section 19(b) of the Natural Gas Act, 52 Stat. 831 (as amended, 72 Stat. 947), 15 U. S. C. A. §717r(b) (Supp. 1958), and Section 10(e) of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. §1009(e), which are printed in full as Appendices B and C hereto.

Statement of the Case

This case involves review of an order of the Commission determining the rate effective on June 7, 1954 under a contract filed with the Commission by Shell Oil Company (Shell) as a gas rate schedule as required by the Commission's regulations (18 C. F. R. §§154.92-94 (Supp. 1958)) issued pursuant to *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672.

Texas Gas, an interstate gas pipeline company, intervened in these proceedings because it was the purchaser under the rate schedule.* Louisville, a customer of Texas Gas, was an intervenor because a decision in favor of Shell

---

* The original party to the Shell contract was a subsidiary of Texas Gas, Louisiana Natural Gas Corporation, which was later merged into Texas Gas. For convenience, "Texas Gas" will be used throughout this Petition to refer to both the parent and subsidiary.

would have an adverse effect upon the ultimate consumers served by Louisville.

The petition filed by the Commission properly sets out the facts. This petition will only restate those key facts essential to an understanding of the general questions presented.

The Shell contract, executed in 1951, contains a favored-nation clause which reads as follows:

> *"If at any time after December 31, 1951, Buyer shall enter into a contract providing for the purchase by it of gas* produced from a field or fields located, and delivered to Buyer, within a radius of fifty (50) miles of any point of delivery provided hereunder, Buyer shall forthwith notify Seller of such fact, and if the price per one thousand (1000) cubic feet at any time payable under such other contract is higher than the price payable hereunder, each price payable hereunder which is less than the price payable at the same time under such other contract shall be immediately increased so that it will equal the price payable under such other contract. In determining whether the price payable under such other contract is 'higher' than the price payable for gas under this contract, due consideration shall be given to the provisions of this contract as compared with such other contract as to quality of gas, delivery pressures, gathering and compressing arrangements, quantity, provisions regarding measurement of gas, including deviation from Boyle's Law, taxes payable on or in respect of gas delivered and all other pertinent factors." (R. 239-40).*

In September 1943, Defense Plant Corporation** entered into a 25-year gas purchase contract with Atlantic

---

* Emphasis is supplied throughout this petition.

** This contract was assigned to Texas Gas in 1949 (R. 287).

Refining Company (Atlantic) (R. 267-79) which fixed the rate to be paid for gas delivered thereunder during the first five years and provided that, at the beginning of each subsequent five-year period, the parties were to reach an agreement as to the price "after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana" (R. 270-71). If the parties were unable so to redetermine the price for any such period, the contract did not terminate but such redetermination was to be made by arbitration (R. 271, 276-77).

Before the Commission, Shell claimed that such a price redetermination between Texas Gas and Atlantic, completed in February 1954 (R. 132), operated to increase or "trigger" the Shell rate under the above favored-nation clause.

The Commission (unanimously reversing the Examiner) rejected Shell's claim, ruling that the "future contract" provision of the favored-nation clause limited its scope to higher prices paid under contracts entered into after 1951, and did not cover price redeterminations pursuant to a pre-1952 contract (R. 2118-21). Among the Commission's reasons was the marked difference in terminology employed in this and other gas purchase contracts (Order Denying Rehearing—R. 2151-52).

Upon Shell's petition for review, the Court of Appeals reversed the Commission's order. It construed the contract de novo, and, in so doing, made findings (App. A, pp. 4a-6a) which may be summarized as follows:

> 1. That the "usual objective" of a favored-nation clause is "to assure the seller a *top price* for its gas", and then, interpreting certain testimony, that these "facts tend strongly to demonstrate that the intention of the parties was for *any higher price*" to trigger a Shell price rise (with one possible exception).

At the outset of this sizeable task of interpreting producer rate schedules, it is imperative that the Court make clear the proper division of function between the courts and the Commission. The decision below illustrates that, otherwise, the reviewing courts will not content themselves with ascertaining whether the administrative interpretation is supported, nor will they adhere to the prohibition against independent judicial appraisal of evidentiary material and industry practice. Compare also, e.g., *FTC* v. *Sewell*, 353 U. S. 969; Jaffe, *Judicial Review: Question of Fact*, 69 Harv. L. Rev. 1020, 1029 (1956). If unchecked, such tendencies obviously have the capacity to frustrate the essential aims of the administrative process—uniformity of interpretation and full utilization of specialized agency expertise.

In addition, the Court of Appeals' ruling on the merits will have a broad and unsettling effect upon the natural gas industry. "Favored-nation" clauses are extensively used in producer rate schedules.* The court below has told

---

presented: *Amerada Petrol. Co.* (Docket No. G-16117); *Atlantic Ref. Co.* (G-18565); *id.* (G-18752); *F. G. Blackwood* (G-18515); *Cabot Carbon Co.* (G-18842); *id.* (G-18844); *Continental Oil Co.* (G-18566); *J. L. Hamon* (G-18327); *Herd O. & G. Co.* (G-18769); *Hassie Hunt Trust* (G-18093); *H. L. Hunt* (G-18092); *id.* (re Sched. Nos. 6 & 15; protest filed 5/11/59); *Hunt Oil Co.* (G-18068); *W. H. Hunt Trust Estate* (G-18091); *Monterey Oil Co.* (G-18568); *Peerless O. & G. Co.* (G-18701); *Phillips Petrol. Co.* (G-1148, *et al.*: initial decision of 4/6/59, pp. 305-10); *id.* (G-10908, *et al.*); *id.* (G-14115); *Pure Oil Co.* (G-17930); *Sinclair O. & G. Co.* (G-18326); *Shell Oil Co.* (G-18845); *G. Stratton, Jr.* (G-18692); *Warren Petrol. Corp.* (G-18467); *id.* (G-18517); *id.* (G-18560).

---

* A Commission Staff study of contracts in the Gulf Coast area filed by the spring of 1959 shows that 1545 of those contracts—or 46%—had favored-nation clauses (see Commission's petition for a writ of certiorari, p. 18). The great public importance of such favored-nation provisions is revealed in a pending proceeding before the Commission in which those favored-nation provisions involve, directly and indirectly, annual increases in excess of

the Commission and the industry that the "usual purpose" of such clauses—regardless of how they are worded—as well as the intention of the parties to long term contracts using such provisions, "is to assure the seller of a top price for its gas". Its sweeping findings of "usual purpose" and intention, in effect, fix the meaning of all favored-nation clauses, despite variations in their language.

In fact, the plain result of the decision below would be the practical elimination of hundreds of provisions using the type of limitation which is here in issue. In the Gulf Coast area, *the "future contract" limitation now appears in 580 other rate schedules,* involving scores of other producers and numerous pipeline companies.* In that area, this limiting condition is employed in over 1 out of every 3 favored-nation clauses.

The wide and disruptive influence of the lower court's decision is a classic illustration of the vice of unlimited review. The ultimate fruit would be unwarranted rate increases by producers which must be passed on to the

---

$35,000,000. *Pure Oil Co.* (Docket No. G-17930; order of 5/12/59). The Commission noted: "*The wide-spread use of favored-nation devices, the successive claims of their being activated and their broad national effect, give cause for grave concern.* The favored-nation system of contracting appears to cause prices to rise in concert. In the United States, concerted price changes when brought about through arrangements among vendors in an industry have always aroused public apprehension. They have long been regarded by the Congress as phenomena requiring the closest scrutiny from those agencies charged with surveillance of commerce in the public interest."

---

* From the Staff study referred to in the preceding footnote. The "future contract" limitation appeared in 17% of all such contracts, and 37% of those having favored-nation provisions. Due to the prevalence of both price redetermination provisions and the "future contract" limitation, several other cases have already arisen presenting the issue of whether price redetermination is a new contract. *W. H. Hunt Trust Estate* (Docket No. G-18091); *H. L. Hunt* (G-18092); *Hassie Hunt Trust* (G-18093); *Atlantic Refining Co.* (G-18752).

"burner-tip" consumers, as well as needless proceedings before the Commission and the courts.

Moreover, besides reaching an independent and final conclusion as to the meaning of the rate schedule, and making de novo findings of fact and of industry practicalities, the Court of Appeals failed to make any real attempt to analyze the written terms of the schedule or the other evidence supporting the administrative order, and did not make even a gesture of deference to the Commission's special qualifications. That court apparently believed that it could retry the case as though the Commission had never passed on the question. Such a precedent obviously does not bode well for any other administrative agency.

2. Trial De Novo A Serious Departure From Proper Scope of Review Proceedings

The Court May Not Substitute Its Interpretation of the Rate Schedule For That of the Commission

As the Court has recently held in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Div.*, 358 U. S. 103, 114, the function of the court in reviewing an administrative interpretation of a rate schedule is limited. The court must of course inquire whether the Commission followed accepted legal principles and whether the record supports the agency's view. But, the court may not do more. Because this question "involves matters peculiarly within the area of the Commission's special competence," the court may not decide that the agency's reading is incorrect merely because the court would reach a different result, and it certainly may not find the meaning for the Commission.

In this respect, the decision below is in conflict with the principles laid down in the *Memphis* case, as well as those

followed in *United States* v. *ICC*, 198 F. 2d 958, 963-64, 975 (D. C. Cir. 1952), *cert. denied*, 344 U. S. 893. Cf. *Phillips Petroleum Co.* v. *FPC*, 258 F. 2d 906, 918 (10th Cir. 1958).

Nowhere did the court below attempt to discuss the principles which should guide the Commission in ascertaining the meaning of the rate schedule. Neither did it review any of the evidence supporting the Commission's order. Instead, that court forged ahead and reached an independent conclusion, as though it were the tribunal of first instance.

In fact, the failure of that court to quarrel with any principle of law followed by the Commission is itself reason for affirmance of the Commission. Similar significance attaches to that court's agreement that, "abstractly", the Commission's view was acceptable. This is tantamount to a holding that the Commission's order is not contrary to law.

The Court of Appeals' real quarrel was with extrinsic facts and the business setting. Even in this respect, there was no attempt to review the whole record or to weigh the evidence which supports the administrative order.

Moreover, the several instances in which the court below made its own findings of fact and of business practicalities constitute such an extreme departure that it, by itself, is a serious and independent reason why the Court should act in this case.

Reviewing Court Has No Power to Find Facts

Affirmative fact finding by a reviewing court (absent a statutory provision for a trial de novo) has been condemned repeatedly by the Court and the Courts of Appeals. Under statutes such as the Natural Gas Act where agency findings are conclusive if adequately supported, the role of fact-

the Commission's special competence is most compelling when, as the Court of Appeals has ruled in this case, the interpretation depends either upon evaluation of parol or other evidence dehors the written contract, or upon business practicalities in this industry. Cf. *United States* v. *Western Pacific R. R.*, 352 U. S. 59, 67.

3. Court's De Novo Interpretation Revised the Rate Schedule

It is respectfully submitted that the present deviation from the proper function of the reviewing court makes painfully clear the wisdom of the rule against a trial de novo in the Court of Appeals. We believe that the terminology of the "future contract" limitation is so clear, or at the very least so amply supports the Commission's order, that the order must be sustained.*

Nonetheless, without any real discussion of the meaning or purpose of the limitation requiring entry into a future

---

* If reference to extrinsic data is thought to be desirable, the Commission's expert reliance in its order denying rehearing (R. 2151-52) upon the marked difference in terminology between the present contract and other contracts in the record should be sufficient. In addition, the record contains numerous acts by Shell between March and October 1954 acquiescing in the unescalated rate or admitting that it had not increased, even though it had actual knowledge of the Atlantic price redetermination (R. 48-49, 147-218, 221). Even after raising the question (R. 122, 222), Shell on three occasions in 1956 and 1957 again admitted that the lower rate was proper in three statements to public accountants auditing the Texas Gas books (R. 224-26). Such extrinsic evidence is given great weight when there is doubt as to the meaning of the written word. See, e. g., *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, 118. Before reliable findings could be made on the issues passed upon by the Court of Appeals, an adequate record would have to be made on those questions. This was not done in the first instance (and properly so) because such findings were and are unnecessary in view of the plain language of the rate schedule. Thus, for example, neither the Examiner nor the Commission passed upon them, and Shell itself did not urge them in its petition for rehearing before the Commission (R. 2129-44).

contract, the Court of Appeals by-passed the Shell schedule itself and, instead, addressed itself to parol evidence, subjective intention of the parties and other extraneous matters. The impropriety of not first analyzing the written word is fundamental. E.g., *Simpson Bros.* v. *District of Columbia,* 179 F. 2d 430, 434 (D. C. Cir. 1949), *cert. denied,* 338 U. S. 911.

Even worse, the court's findings that the usual objective of a favored-nation provision and the parties' intention was to give Shell the benefit of every higher price would do away entirely with the "future-contract" limitation. So would the finding or conclusion that "for purposes of the favored nation clause" establishment of price, *by whatever means,* is entry into a contract.* The requirement of entry into a new contract would be replaced by an unrestricted grant of every higher price paid by Texas Gas. The limiting clause "enter into a contract" would be radically changed to read "pay a higher price", and would really then become entirely superfluous. Cf. *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Div.,* 358 U. S. 103, 115-16 n. 10.

As indicated by the broad industry use of this type of limitation, the decision below cannot be shrugged off as

---

* It seems clear that the reference by the court below to "purposes" meant its previously stated findings that the aim is to grant the highest price (App. A., pp. 4a-5a). But, even if this were a ruling of law, it could not be upheld in the face of the universally accepted doctrine that a contract is valid and enforceable when, instead of specifying price in dollars and cents, price is to be fixed by applying a yardstick or by a third party under an arbitration or appraisal provision. Re price yardstick, see e. g. *Col-Tex Refining Co.* v. *Coffield & Guthrie, Inc.,* 196 F. 2d 788, 790-91 (5th Cir. 1952); 5 Williston, *Contracts* §574 (rev. ed. 1937). Re arbitration or appraisal, see e. g., *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109, 121; *Texas Co.* v. *Z. & M. Independent Oil Co.,* 156 F. 2d 862, 866-67 (2d Cir. 1946); 5 Williston, *Contracts* §1421, at 3967-68 (rev. ed. 1937); 6 Williston, *Contracts* §1921A (rev. ed. 1938); 1 Williston, *Sales* §176 (rev. ed. 1948).

merely ignoring terms which were chosen by accident or as rejecting a semantic argument which capitalized on chance phraseology. There is even more behind the "future-contract" restriction than the fact that the number of rate increases is kept down—important as that is for the consuming public. The substantive economic purpose of this limitation is to permit the purchasing pipeline system to keep in its own hands a large measure of control over its future cost of gas.

Under the limitation, no escalation takes place unless the pipeline company decides to enter into a new contract. This gives the purchaser the important opportunity of weighing and forestalling favored-nation side-effects. Such an opportunity is denied the purchaser under the less limited clause when it is also caught by rate increases forced by obligatory escalation under prior contracts (such as the Atlantic price redetermination).

Therefore, the decision below, in enabling obligatory increases to trigger a rate rise despite the new contract restriction, directly frustrates the whole purpose of the limitation.

Atlantic Price Redetermination Is Not Entry into a Contract

Even viewed as though it were a matter of pure contract law, the decision of the court below is simply wrong in its conclusion that the redetermination of price between Atlantic and Texas Gas constituted entrance into a contract. The court assumes that the Atlantic contract is enforceable for its 25-year duration, including Atlantic's obligation to sell and deliver and the parties' reciprocal obligations to redetermine price periodically. Nonetheless, the court, at the same time and with respect to the same instrument, concludes that a series of independent contracts are involved in Texas Gas' obligation to pay the prices

agreed to under the machinery in the basic contract. In capsule, the Court simply states this by saying "*complete performance of the 1943 contract* required the parties to enter into subsequent contracts" (App. A, p. 6a).

When, at the beginning of a 5-year period, Texas Gas and Atlantic renegotiated and agreed upon a higher price, they were not making a wholly *new* "contract". They were mutually agreeing upon a change in price, in accordance with an express provision of their original, and still fully operative, contract.* A failure to agree on this change would not have been a *breach* of contract; but it would have at once brought into operation the provision for arbitration. This is a valid provision binding on both parties. The original contract would still be fully operative; and the price fixed by the arbitrator would now be *the contract price.* No one can doubt that Texas Gas would be bound to pay this new price; and it would be so bound by virtue of the original contract, not by virtue of a *new* contract.

A new price fixed by an arbitrator would certainly not be one fixed by a new contract. The same is true of a new price fixed by redetermination as provided in the original contract. Neither party had power to bind the other to a

---

* See *Brassert* v. *Clark*, 162 F. 2d 967, 971-2 (2d Cir. 1947); *Phillips Petroleum Co.* v. *FPC*, 227 F. 2d 470, 475 (10th Cir. 1955), *cert. denied*, 350 U. S. 1005; *McKell* v. *Chesapeake & O. Ry.*, 175 Fed. 321, 328-29 (6th Cir. 1910), *cert. denied*, 220 U. S. 613; *May Metropolitan Corp.* v. *May Oil Burner Corp.*, 290 N. Y. 260, 265, 49 N. E. 2d 13, 15-16 (1943). The court's notion that there are separate contracts disregards the express provisions in the Atlantic rate schedule specifying a price yardstick for the periodic price redetermination, even apart from the provision for arbitration in the event of disagreement. It prescribes that, for the last four 5-year periods, prices will be agreed upon after a survey of "prevailing prices" for gas being sold in similar quantities in southwestern Louisiana (R. 271). Shell's own witness testified under direct examination that this was a binding price standard (R. 78-79). Such a standard is enforceable. See *Cities Service Gas Producing Co.* v. *FPC*, 233 F. 2d 726, 727 (10th Cir. 1956), *cert. denied*, 352 U. S. 911.

new price without the other's assent; and each party was privileged to refuse his assent to any new price if he willed to do so. But here his will is subject to control—he must assent to some new price proposed by the other party or pay what an arbitrator tells him to pay. A party's will is not free if he has a choice between only two limited alternatives like these. He must agree *or else.*

One who is making a *new contract* has a greater freedom than had Texas Gas and Atlantic. He is free to *Assent* or *Not Assent.* This is not a choice between two alternatives; his freedom of choice is *absolutely unlimited.* If he chooses *Not Assent,* he is still as free as before, and under not the slightest degree of legal obligation. Not so Texas and Atlantic. Their alternative *"or else"* had a legal bite.

One who makes a promise like this is not making an "illusory" promise. It is itself an enforceable promise, and it is a sufficient consideration for a return promise.

The foregoing is in exact harmony with the Court's recent decision in the *Memphis* case (358 U. S. 103). In that case, the Court affirmed the Commission's determination that new rate schedules filed by United Gas Pipeline Company did not change *the contract* but merely changed the prices in accordance with the original service contract. This Court held that *no new contract* was necessary to make the new prices effective. The buyer was bound to pay the new prices because his original contract expressly provided that he should. The decision of the Court of Appeals was reversed because it had held the contrary.

The erroneous theory of contract law adopted by the court below is even more startling when it is realized that such theory was developed because of that court's conception of "business practicalities" and "realities of the situation." The lower court's theory might be less startling if there were support in the record for such findings, but this

is not the case here, as noted above, and this void merely points up the wisdom of the rule that reviewing courts may not interfere with the duly delegated functions of administrative agencies.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MATHIAS F. CORREA
63 Wall Street
New York 5, New York
Counsel for Texas Gas Transmission Corporation

GAVIN H. COCHRAN
713-23 Kentucky Home Life Bldg.
Louisville 2, Kentucky
Counsel for Louisville Gas and Electric Company

ARTHUR L. CORBIN
Yale Station
New Haven, Connecticut,

CHARLES F. DETMAR, JR.,
LAWRENCE W. KEEPNEWS
63 Wall Street
New York 5, New York,
Of Counsel.

July 1, 1959

APPENDIX A

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 12,568

SHELL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent,

TEXAS GAS TRANSMISSION CORPORATION,

Intervenor,

and

LOUISVILLE GAS & ELECTRIC COMPANY,

Intervenor.

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL POWER COMMISSION

Argued October 6, 1958

Before:

GOODRICH, McLAUGHLIN and STALEY,

Circuit Judges.

OPINION OF THE COURT

(Filed January 27, 1959)

By McLAUGHLIN, *Circuit Judge.*

This case is another in that line wherein the issue has been the effective rate on June 7, 1954 for natural gas sold by a so-called independent producer. That date was when the Supreme Court announced its decision in Phillips Petroleum Co. *v.* Wisconsin, 347 U. S. 672 (1954). The effect of

that decision was to subject independent producers of natural gas to regulation by the Federal Power Commission. The Commission, in implementing the decision, called for filing of rate schedules setting forth "• • • rates • • • effective on June 7, 1954."

What that rate was for Shell Oil Company in its contract with Louisiana Natural Gas Company[1] depends upon the contract-established provisions rather than on the fortuity of rates which were being actually paid on that date. See Natural Gas Pipeline Company *v.* Federal Power Commission, 253 F. 2d 3, (3 Cir. 1958), cert. den. 357 U. S. 927 (1958). The contract had been entered on May 1, 1951 and for the period in question provided for the sale of gas at 8.997¢ per Mcf, unless "• • • at any time after December 31, 1951, Buyer [Louisiana] • • • [should] enter into a contract providing for the purchase by it of gas • • •" produced and delivered within a fifty mile radius of any delivery point specified. In that event the contract price was to escalate to the same price as that called for by the subsequent contract with the other producer.

Louisiana had already succeeded to rights as purchaser under a contract entered with Atlantic Refining Company, another producer, in 1943. Under that contract buyer agreed to buy specified daily quantities of gas; it was provided that the rights of the parties should continue for the producing life of the field involved but for not more than twenty-five years. In that contract the buyer agreed to pay 2.2¢ net per Mcf for gas received for the first five years. No fixed price was established for periods after that, but rather the contract provided:

> "(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price

[1] Louisiana Natural Gas Company was a subsidiary of Texas Gas Transmission Corporation. On June 30, 1955 it was merged into the parent corporation.

to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.

"(c) During succeeding five-year periods, price to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.

"(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII."[2]

A price for the second five year period had been agreed to by negotiation between the buyer and seller, but this agreement expired on August 31, 1953. Louisiana and Atlantic

---

[2] Condition XII reads:

"• • • The party desiring such arbitration shall notify the other and in such notice shall name an arbitrator, (sic) the arbitrator to be appointed by the other party shall be named within ten (10) days after receipt of such notice of arbitration, and an additional arbitrator shall, within ten (10) days of the appointment of the second arbitrator, be selected by the two (2) arbitrators theretofore appointed, but if one of said parties shall have failed to appoint an arbitrator within the time provided herein, it is expressly understood and agreed that the sole arbitrator shall arbitrate the question alone. If arbitrators shall have been appointed by the respective parties and shall have failed to select the third arbitrator within the above stated time, the third arbitrator shall be appointed by the senior Judge of the 5th Federal Judicial Circuit upon application therefor by either of said parties to the arbitration.

"• • • The decision in writing signed by a majority of the arbitrators shall be final and conclusive with respect to the matter submitted and the parties hereto agree to accept and abide by the same."

undertook negotiations in September of that year for agreeing to a price for the third five year period.

The parties had difficulty in agreeing. The negotiations consumed five and a half months, finally culminating in an agreement dated February 17, 1954, whereby the price was established at 12.5¢ per Mcf, plus gathering tax. Shell thereafter accidentally learned of this and subsequently notified Louisiana that it felt entitled under its contract to an escalation of its price to the same 12.5¢ level.

There is no dispute that the fifty mile radius requirement of the Louisiana-Shell contract is satisfied. The argument concerning Shell's right to a higher price turns on whether the Louisiana-Atlantic agreement of February, 1954 was an "entering of a contract" which activated the price escalation clause of the Louisiana-Shell contract.

When Shell filed its rate schedule with the Federal Power Commission pursuant to the Commission's orders implementing the Phillips decision, the Commission neither accepted or rejected the submitted rate, pending further explanation by Shell of why it claimed 12.5¢ per Mcf. Shell presented that explanation in February, 1957 when it filed for an increase in rate to 16.75¢ per Mcf. The reasonableness of that rate is still awaiting hearing. The Commission at this point directed that a hearing be held to determine the effective rate on June 7, 1954 under the Shell contract which it simultaneously accepted for filing.

As a result of the hearing the examiner found the effective rate to be 12.5¢. This finding was subsequently reversed on November 12, 1957, by the Commission whose decision is here on appeal by Shell.

The clause in the Louisiana-Shell contract which is central to this controversy is one of the type commonly referred to in the trade as a "most favored nation" clause. The usual objective of such a clause is to assure the seller a top price for its gas. Testimony at the hearing before the Commission's examiner was that Louisiana had desired a twenty year contract which was for a term longer than

Shell had at that time ever contracted for, at least in that area. Because of difficulty in establishing a price for so long a period, the clause in question was agreed upon. It appears that at the time of contracting Shell knew Louisiana was purchasing gas from Atlantic but was not familiar with the specific terms of that contract. These facts tend strongly to demonstrate that the intention of the parties was for any higher price paid by Louisiana to another producer to trigger a rise on the Shell contract to the same figure except possibly where a pre-existing contract already provided for a settled step-up in price.

If the precise arrangement under the Atlantic contract had been known to Shell, then perhaps Louisiana could argue to more purpose that the wording of the Shell contract (which calls for the "enter[ing of] a contract providing for the purchase * * * of gas") was not intended to trigger escalation following an agreement on price when that agreement was reached under an earlier gas purchase contract which contained a binding agreement subsequently to agree on price. But even then the fact cannot be avoided that, at least for purposes of the favored nation clause, the "entering of a contract for the purchase of gas" has not been accomplished until the price has been established. True, Atlantic was obligated to deliver gas for twenty years from 1943 but, just as important, Louisiana was bound to pay for it. And while there may have been enforceable means for settling the rate of payment in the event the parties could not agree, it would nonetheless be true that it was when the price was finally established, by whatever means, that a contract had thereupon been entered. Actually, if the Louisiana-Atlantic agreement of February 17, 1954, was not an entering of a contract we are at a loss as to how it would be properly and legally characterized. The situation fits best into the rubric of an accord itself taken as satisfaction. See 6 Williston on Contracts, §§ 1841, 1846 (rev. ed. 1938). Both parties gave up their rights under the original contract to proceed to arbitration, prom-

ising on the one side to pay and on the other side to accept the price reached.

To make the date of the accord retroactive to the date of the original agreement-to-agree is, of course, abstractly conceivable; but for a court to attribute that effect to the Atlantic contract and apply it to the Shell contract in the absence of recognition of this possibility in the Shell contract would take the law out of the realm of business practicalities. It is far more in line with the realities of the situation to say that complete performance of the 1943 contract required the parties to enter into subsequent contracts. The entering into one of those subsequent contracts triggered the escalation clause in the Shell agreement.

We have assumed without deciding that the Atlantic contract of 1943 did in fact impose a binding agreement-to-agree on the price for gas in each of the contract's last four five year periods. Thus it has not been necessary to determine the several questions raised in connection with the arguments directed to that phase of the case. Of course if the Atlantic contract of 1943 was not a binding agreement-to-agree, that circumstance alone would place the February, 1954 Atlantic contract fully within the terms of the escalation clause in the Shell contract.

The Federal Power Commission order of November 12, 1957 finding Shell's rate with Louisiana on June 7, 1954 to be 8.997¢ per Mcf will be vacated. Because the escalation called for by the contract requires consideration of other factors in determining whether the price to another supplier was indeed higher, the cause will be remanded for consideration of those factors.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 12,568.

SHELL OIL COMPANY,

Petitioner,

vs.

FEDERAL POWER COMMISSION,

Respondent,

TEXAS GAS TRANSMISSION CORPORATION,

Intervenor,

LOUISVILLE GAS & ELECTRIC COMPANY,

Intervenor.

Judgment.

Present:

GOODRICH, McLAUGHLIN and STALEY,
Circuit Judges.

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of November 12, 1957 of the Federal Power Commission be, and it is hereby vacated, and the cause remanded with directions to proceed in conformity with the opinion of this Court.

Attest:

IDA O. CRESKOFF,
Clerk.

January 27, 1959.

RECEIVED & FILED
JAN. 27 1959
IDA O. CRESKOFF
Clerk

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 12,568

SHELL OIL COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent,

TEXAS GAS TRANSMISSION CORPORATION,
Intervenor,

and

LOUISVILLE GAS & ELECTRIC COMPANY,
Intervenor.

Present:

GOODRICH, MCLAUGHLIN and STALEY,
Circuit Judges.

Order.

The petitions for rehearing of Federal Power Commission, Texas Gas Transmission Corporation and Louisville Gas & Electric Company in this case are denied.

By the Court,

MCLAUGHLIN,
Circuit Judge.

Dated: March 4, 1959.

RECEIVED & FILED
MAR 5 1959
IDA O. CRESKOFF

APPENDIX B

Section 19(b) of the Natural Gas Act

[as it appears in 15 U. S. C. A. §717r(b) (Supp. 1958)]

[Rehearings; court review of orders]

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals [*] of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to

---

[*] "Circuit court of appeals" was replaced by "court of appeals" by act dated June 25, 1948, effective Sept. 1, 1948 (62 Stat. 869), as amended by act dated May 24, 1949 (63 Stat. 139).

be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

APPENDIX C

Section 10(e) of the Administrative Procedure Act

[Judicial Review of Agency Action]

[SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—]

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

LIBRARY

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	3
Reasons for granting the writ	8
Conclusion	20
Appendix	21

CITATIONS

Cases:

Atlantic Refining Co., The, FPC Docket No. 18752	18
Cities Service Gas Producing Co. v. *FPC*, 253 F. 2d 726, certiorari denied, 352 U.S. 911	13
Far East Conference v. *United States*, 342 U.S. 570	9
Great Northern R. Co. v. *Merchants Elevator Co.*, 259 U.S. 285	10, 11
Hunt, H. L., FPC Docket No. G-18092	18
Hunt Trust Estate, William Herbert, FPC Docket No. G-18091	18
Hunt Trust, Hassie, FPC Docket No. G-18093	18
Mastro Plastics Corp. v. *NLRB*, 350 U.S. 270	11
National Labor Relations Board v. *Hearst Publications*, 322 U.S. 111	9
Natural Gas Pipeline Co. v. *FPC*, 253 F. 2d 3, certiorari denied, 357 U.S. 927	7
Nevada Natural Gas Pipe Line Co. v. *FPC*, decided May 27, 1959 (C.A. 5, Nos. 17074, *et al.*)	13
Phillips Petroleum Co., FPC Docket No. G-1148, et al.	13
Phillips Petroleum Co., FPC Docket No. G-10908	13
Phillips Petroleum Co., FPC Docket No. G-14115	13
Phillips Petroleum Co., 21 F.P.C. 167, petition for review pending (C.A. 10, No. 6154)	13
Phillips Petroleum Co. v. *FPC*, 227 F. 2d 470, certiorari denied, 350 U.S. 1005	13
Phillips Petroleum Co. v. *Wisconsin*, 347 U.S. 672	3
Pure Oil Co., FPC Docket No. G-17930	13
Rochester Telephone Corp. v. *United States*, 307 U.S. 125	9

512511—59——1

Cases—Continued

	Page
Shields v. *Utah Idaho Central R. Co.*, 305 U.S. 177	9
South Chicago Coal & Dock Co. v. *Bassett*, 309 U.S. 251	9
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U.S. 381	9
Unemployment Compensation Commission v. *Aragon*, 329 U.S. 143	9
United Gas Pipe Line Co. v. *Memphis Light, Gas and Water Division*, 358 U.S. 103	11, 12, 13
United States v. *ICC*, 198 F. 2d 958, certiorari denied, 344 U.S. 893	10
United States v. *Western Pacific R. Co.*, 352 U. S. 59	9, 11

Statute and rules:

Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717, *et seq.*	3
§ 4(e)	4
18 C.F.R. 154.91, *et seq*	3

Miscellaneous:

H.R. 8525, 85th Cong., 1st Sess	19
H.R. 366, 86th Cong., 1st Sess	19
Jaffe, *Judicial Review: Question of Law*, 69 Harv. L. Rev. 239	9

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. —

FEDERAL POWER COMMISSION, PETITIONER

v.

SHELL OIL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on January 27, 1959.

OPINIONS BELOW

The opinion of the court of appeals (*infra*, pp. 21–27) is reported at 263 F. 2d 223. The orders of the Federal Power Commission (R. 133–145, 153–162) are reported at 18 F.P.C. 617 and 19 F.P.C. 74.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1959 (*infra*, p. 28). A timely petition for rehearing was denied on March 4, 1959

(*infra*, p. 29). By order of Mr. Justice Brennan, dated May 25, 1959, the time within which to file a petition for a writ of certiorari was extended to and including July 2, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and § 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

The "favored-nation" clause of a contract for the sale of natural gas provided that the producer would be entitled to a price increase should the pipeline thereafter "enter into a contract providing for the purchase by it of gas" at a higher price. The pipeline thereafter agreed to a higher price under a pre-existing contract with another producer which required that the price be redetermined every five years on the basis of the then-prevailing prices, the price to be fixed by arbitration should the parties fail to agree. In proceedings under the Natural Gas Act to determine respondent's effective rate, its contract having been filed as a rate schedule, the Federal Power Commission held that the price redetermination under the pipeline's prior contract with the other producer was not a new contract for the purchase of gas within the meaning of respondent's favored-nation clause and that respondent was not entitled to a price increase. The questions presented are:

1. Whether a court of appeals, on review of the order, may decide for itself the meaning of the favored-nation clause of respondent's contract or must accept the Commission's interpretation if reasonably supported.

2. Whether the favored-nation clause of respondent's contract provided for a price increase in these circumstances.

STATEMENT

1. Shell Oil Company, an independent producer of natural gas, sells gas produced in Southern Louisiana to the Texas Gas Transmission Corporation under a 20-year contract (the "Shell contract") executed in 1951 (R. 52).[1] After the decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, holding sales of natural gas in interstate commerce by independent producers to be subject to the Natural Gas Act (52 Stat. 821, 15 U.S.C. 717, *et seq.*), the Federal Power Commission directed such producers to file rate schedules showing their rates in effect on June 7, 1954, the date of that decision (18 C.F.R. 154.91, *et seq.*). In November 1954, Shell duly filed, as part of its rate schedule, its contract with Texas Gas, together with, as required, a credit statement showing the rate actually being received on that date, which was 8.997 cents per Mcf (R. 81). Shell also filed, however, a "sample" billing statement purporting to show that the correct rate was 12.5 cents (R. 80). The Commission, in January 1955, notified Shell that it would not accept the filing until an explanation of the effective rate was provided (R. 161–162). Shell took no action until February 1957, when, in filing a new rate schedule prospectively changing its rate for the sale to 16.75 cents, it claimed that its effective rate on

[1] The contract was originally with Texas Gas' wholly-owned subsidiary, Louisiana Natural Gas Corporation. The corporations merged in June 1955 (R. 134).

June 7, 1954, was 12.5 cents by virtue of a price increase to which it had become entitled in 1953 under the "favored-nation" clause of its contract with Texas Gas (R. 116).

The Commission suspended the proposed 16.75-cent rate pending a determination of its reasonableness[2] and directed a hearing to determine the rate in effect on June 7, 1954 (R. 116–117). After hearings, the Commission determined that the effective rate in 1954 was 8.997 cents and directed that a revised billing statement so showing be filed with the contract as the rate in effect on June 7, 1954 (R. 133–143).[3] The court of appeals set aside the order, holding that the rate had been increased in 1953 under the favored-nation clause (*infra*, pp. 21–27).

2. Admittedly, the rate in effect under the contract prior to 1953 was 8.997 cents, and the sole question before the Commission and the court below was whether Shell had become entitled to an increase under its favored-nation clause in 1953. The facts relevant to that issue are as follows:

The favored-nation clause of the 1951 Shell contract provided (R. 63):

---

[2] That proceeding is still pending before the Commission. The new rate (based upon another purchase of gas by Texas Gas admittedly within the favored-nation clause) went into effect after the expiration of the five-month suspension period, subject to the Commission's power to order refunds if the increased rate is ultimately found to have been unjustified. See § 4(e) of the Act, 15 U.S.C. 717c(e).

[3] The contract itself had been accepted for filing in the order directing the hearing, with only the filing of the required billing statement being held in abeyance (R. 116–117).

> 3. If at any time after December 31, 1951, Buyer [Texas Gas] shall enter into a contract providing for the purchase by it of gas produced from a field or fields located, and delivered to Buyer, within a radius of fifty (50) miles of any point of delivery provided hereunder, Buyer shall forthwith notify Seller [Shell] of such fact, and if the price per one thousand (1000) cubic feet at any time payable under such other contract is higher than the price payable hereunder, each price payable hereunder which is less than the price payable at the same time under such other contract shall be immediately increased so that it will equal the price payable under such other contract. * * *

At the time the Shell contract was made, Texas Gas was also buying gas in the same area from the Atlantic Refining Company under a 25-year contract (the "Atlantic contract") that had been executed on September 1, 1943.[4] That contract had fixed the rate to be paid during the first five years of the 25-year term and provided (R. 87–88):

> (b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing

[4] The contract had initially been between Atlantic and the Defense Plant Corporation, but Texas Gas (through its subsequently-merged subsidiary) had acquired all the latter's rights on May 11, 1949 (R. 125).

> prices for gas being sold in similar quantities in the southwestern part of Louisiana.
>
> (c) During succeeding five-year periods, prices to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.
>
> (d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII.[5]

Both the 1948 and the 1953 price redeterminations under that provision were agreed upon without resort to arbitration, the price fixed for the period beginning September 1, 1953, being 12.5 cents per Mcf.[6]

Shell contended that by agreeing to the 1953 price redetermination under the Atlantic contract Texas Gas had, after 1951, "enter[ed] into a contract providing for the purchase by it of gas" within the meaning of the Shell contract. Accordingly, it claimed to be entitled to an increase of its rates to the same level under the favored-nation clause of its contract.

---

[5] Condition XII (R. 93–94) was a typical arbitration provision calling for the appointment by each party of one arbitrator and the selection of a third by the two so appointed or, if they failed to agree, by a designated judge. If either party failed to appoint an arbitrator, the other party's appointee was to be sole arbitrator. The decision of the arbitrators was to be "final and conclusive."

[6] R. 37, 138. The second price redetermination was not actually agreed upon until February 17, 1954, but, since it became effective in 1953, will be referred to as the 1953 redetermination.

3. Noting that the provision for arbitration made the price-redetermination provisions of the Atlantic contract definite and enforceable, the Commission, reversing its examiner (R. 124–132), held that the 1953 redetermination agreement was but action which Texas Gas was obligated to take under its pre-existing contract with Atlantic and was not the entering of a new contract for the purchase of gas within the meaning of the Shell favored-nation clause (R. 137–142, 155–158). In support of that interpretation of the Shell contract, the Commission, in its order denying rehearing, noted the numerous examples in the record of other contracts—to which Shell itself was a party—containing favored-nation clauses which, in contrast to the clause used here, were not limited in operation to higher prices paid under new contracts but were by their express terms equally applicable to price increases given under pre-existing contracts (R. 157–158).[7]

4. The court of appeals vacated the Commission's order and remanded the case to the Commission, holding that the 1953 Atlantic price redetermination had entitled Shell to a price increase under its favored-nation clause (*infra*, pp. 21–27).[8] Although as-

[7] As an alternative ground, the Commission also held that the price which Shell was in fact receiving on June 7, 1954, was its effective rate as of that date. That ground was abandoned in the court below in light of the court's intervening contrary decision in *Natural Gas Pipeline Co.* v. *FPC*, 253 F. 2d 3 (C.A. 3), certiorari denied, 357 U.S. 927.

[8] The remand was to determine the precise amount, if any, by which the Atlantic redetermined price exceeded the Shell rate, taking into account other terms of the sales bearing on the comparability of the rates (*infra*, p. 27).

suming for purposes of decision that the Atlantic contract was enforceable and thus a "binding agreement-to-agree" (*infra*, p. 26), the court held (*infra*, pp. 25–26):

> * * * the fact cannot be avoided that, at least for purposes of the favored nation clause, the "entering of a contract for the purchase of gas" has not been accomplished until the price has been established. True, Atlantic was obligated to deliver gas for twenty years from 1943 but, just as important, Louisiana was bound to pay for it. And while there may have been enforceable means for settling the rate of payment in the event the parties could not agree, it would nonetheless be true that it was when the price was finally established, by whatever means, that a contract had thereupon been entered. Actually, if the Louisiana-Atlantic agreement of February 17, 1954, was not an entering of a contract we are at a loss as to how it would be properly and legally characterized. The situation fits best into the rubric of an accord itself taken as satisfaction. See 6 Williston on Contracts, §§ 1841, 1846 (rev. ed. 1938). Both parties gave up their rights under the original contract to proceed to arbitration, promising on the one side to pay and on the other side to accept the price reached.

REASONS FOR GRANTING THE WRIT

The Shell contract provided for a corresponding price increase "If at any time after December 31, 1951, Buyer [Texas Gas] shall enter into a contract providing for the purchase by it of gas" at a higher price. The Commission interpreted that provision

as not applying to a price redetermination under a pre-1952 contract. The court of appeals, without finding that the Commission's interpretation was unreasonable or unsupported by the evidence, reached the opposite conclusion. Whether the court of appeals could thus decide for itself the meaning of the Shell contract—presumably because a question of contract interpretation is often said to be a question of "law"—raises problems of major importance in the administration of the Natural Gas Act.

1. This Court has increasingly recognized the inadequacy of the law-fact distinction as the determinant of the allocation of functions between court and agency and has looked instead to such considerations as the desirability of uniformity, the bearing of the agency's specialized knowledge upon resolution of the question, and the implicit purposes of the statute.[9] Upon such considerations, even some questions of statutory interpretation have been left to administrative agencies with but limited review by the courts.[10] That questions of contract interpretation are for some purposes characterized as questions of law is,

[9] Cf. *Far East Conference* v. *United States*, 342 U.S. 570, 574–575; *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 64–65.

[10] See, *e. g.*, *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111 ("employees"); *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S. 177 ("interurban railway"); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 ("bituminous" coal); *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125 ("control" of a company); *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251 ("member of the crew"); *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143 ("labor dispute in active progress"). See Jaffe, *Judicial Review: Question of Law*, 69 Harv. L. Rev. 239.

therefore, not determinative, and the controlling consideration is rather that the interpretation of filed rate contracts is a function which the Commission, because of its intimate familiarity with the business and contracting practices of the industry,[11] is far better equipped to perform than are the courts.

Whatever doubt there may once have been[12] as to the respective roles of the Commission and the courts

---

[11] Even the court of appeals, though perhaps unwittingly, recognized the importance of such factors by invoking, in support of its interpretation, its own notions of the "usual objective" of such clauses, the practical reasons for including such a clause and the likely intention of the parties to be inferred therefrom, and the "business practicalities" bearing on the question (*infra*, pp. 25, 26). It was, we submit, clearly improper for the court to make such inferences of industry practices for itself, and if it considered the Commission's interpretation not adequately supported by the language of the contract and other evidence relied on by the Commission, the proper course would have been to remand the case to the Commission for further findings. As we shall show (*infra*, pp. 14–17), however, the clause was not at all ambiguous to one versed in the usages of the industry, and there was in fact no need for further findings by the Commission.

[12] The doubt seems to have been generated by cases holding that the courts may interpret for themselves railroad tariffs filed with the Interstate Commerce Commission. *E.g.*, *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285. Those cases, however, did not involve review of ICC interpretations but rather original court actions to recover overcharges, the issue being whether the question of interpretation, though not within the ICC's original jurisdiction, should nevertheless be referred to it for decision. From those cases it does not follow that, when an agency has in fact passed upon a question of contract interpretation arising in a matter within its original jurisdiction, a reviewing court may ignore the agency's determination and decide the question for itself. Compare *United States* v. *ICC*, 198 F. 2d 958 (C.A.D.C.), certiorari denied, 344 U.S. 893, where the court, in *reviewing* an ICC

in the interpretation of filed rate contracts has, we submit, been resolved by this Court's recent decision in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division,* 358 U.S. 103. In that case, the Commission had interpreted a filed rate contract as authorizing unilateral rate changes and had accepted such a change for filing. The court of appeals set aside the order without reaching the contract-interpretation question. This Court, reversing, deemed it unnecessary to remand the case to the court of appeals for consideration of that question since it involved "matters peculiarly within the area of the Commission's special competence and as to which we could hardly be aided by a further examination of the record by the Court of Appeals" (p. 114). Proceeding itself to the interpretation question, the Court held (*ibid.*):

---

interpretation of a tariff (in a reparations proceeding), asserted only a limited review power (pp. 963–964) and, finding the interpretation not adequately supported (pp. 965–968), remanded the issue to the ICC for further consideration (p. 975). Moreover, the Court has recently limited the *Great Northern* line of cases by requiring issues of tariff construction which may turn upon familiarity with underlying rate-making factors to be referred to the ICC even when they arise initially in an original action at law. *United States* v. *Western Pacific R. Co.*, 352 U.S. 59.

In other areas, analogous questions of the scope of review of administrative interpretations of contracts have seldom arisen and, when present, have received little recognition. See, *e.g.*, *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 279–284, where the Court may have interpreted a no-strike provision of a collective-bargaining agreement for itself, noting only that the concurrent interpretation of the provision by the Board and the court of appeals, which it affirmed, was "entitled to much weight" (p. 281).

> After scrutinizing the record we are satisfied that the Commission's determination as to the meaning of the service agreements here involved was amply supported both factually and legally. There is no necessity for us to embark upon a detailed discussion of the various contentions made by the parties, none of which appears to have been overlooked or misapprehended by the Commission. * * *

The Court then limited its discussion of the issue to a brief mention of some of the factors supporting the Commission's interpretation.

The disposition of the contract-interpretation question in the *Memphis* case necessarily means, in our view, that the interpretation of filed rate contracts is for the Commission and its interpretation, if reasonably supported, must be accepted by the courts. If that view of the *Memphis* decision be correct, the decision below is in square conflict and should be reversed. If, on the other hand, the implications of the *Memphis* decision remain in doubt, this case affords an opportunity for a restatement and clarification of the relationship of the Commission and the courts in the interpretation of gas sales contracts filed with the Commission as rate schedules.

2. The question is not only important generally in the field of administrative law but is of particular importance to the administration of the Natural Gas Act. Over 10,000 basic contracts of independent producers have already been filed with the Commission as rate schedules, and each of them potentially presents questions of contract interpretation to be resolved by the Commission—*e.g.*, to determine whether a purported

initial rate or change of rates should be accepted for filing. The contracts are typically long, complex, and technical and reflect the industry practices that have grown up to deal with problems peculiar to the industry, making the Commission's accumulated experience and insight of special significance in their interpretation. In addition, because of the specialized nature of the industry, many of the contracts contain substantially identical provisions, and the uniformity that can be achieved by committing their interpretation to a single agency is therefore a primary desideratum.

It is important, moreover, that the question be promptly resolved. The Commission has already had before it numerous cases involving questions of contract interpretation,[13] and the problem of the proper scope of review of its resolution of such questions will recur with increasing frequency. So long as the apparent conflict between the decision below and that in *Memphis* remains unresolved, parties dissatisfied with the Commission's interpretation of a contract can

[13] See, *e.g.*, *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103; *Nevada Natural Gas Pipe Line Co.* v. *FPC*, decided May 27, 1959 (C.A. 5, Nos. 17074, *et al.*); *Cities Service Gas Producing Co.* v. *FPC*, 233 F. 2d 726 (C.A. 10), certiorari denied, 352 U.S. 911; *Phillips Petroleum Co.* v. *FPC*, 227 F. 2d 470 (C.A. 10), certiorari denied, 350 U.S. 1005; *Phillips Petroleum Co.* 21 F.P.C. 167, petition for review pending (C.A. 10, No. 6154). Numerous pending cases also appear to present such questions. *E.g.*, *Pure Oil Co.*, Docket No. G-17930; *Phillips Petroleum Co.*, Docket No. G-10908; *Phillips Petroleum Co.*, Docket No. G-1148, and related cases, Docket Nos. G-16117, G-11217, Examiner's Decision issued April 6, 1959, pp. 304–308; *Phillips Petroleum Co.*, Docket No. G-14115.

hardly be expected not to seek a *de novo* interpretation from a court of appeals.

3. The Commission's interpretation of the Shell contract was patently a reasonable one and should, therefore, have been accepted by the court of appeals whether or not its own, and contrary, interpretation might also have been reasonable.

The essential consequence of a limitation of a favored-nation clause to prices paid under new contracts is that the purchaser thereby retains control over its obligations under the contract—*i.e.*, it can control the event that will trigger a price increase. If a proposed new purchase of gas in the area will, by triggering price increases under existing contracts, be too costly, the purchaser may forego expansion or seek supplies in another area not covered by the favored-nation clauses. Under favored-nation clauses not limited to new contracts, the purchaser does not retain that control: when a seller under an old contract becomes entitled to a price increase under the provisions of its contract, the favored-nation seller automatically becomes entitled to the same increase; in effect, all the price-increase provisions of the buyer's existing contracts are made applicable to the favored-nation seller.

The limitation of a favored-nation clause to new contracts is equally understandable from the point of view of the seller. At the time of contracting, the seller can bargain directly for substantive concessions in its own contract similar to those in the buyer's existing contracts with other producers. Its claims for parity vis-à-vis other existing contracts

can thus be directly negotiated and compromised, so that only the function of assuring equality with future contracts, the terms of which cannot then be known, need be left to the favored-nation clause.

To the Commission, with its familiarity with the kinds of favored-nation clauses used in the industry and the nature of the bargains they reflect, those distinctions (pointed out by the Commission's comparison of the clause here with other clauses not so limited (R. 157–158)) were apparent and the interpretation of the clause here posed no difficulty. Whatever its legal classification, the price redetermination under the Atlantic contract was but the fulfillment of a fixed obligation antedating the Shell contract. Accordingly, it was not a "contract providing for the purchase * * * of gas" entered into after the Shell contract within the meaning and purposes of the Shell favored-nation clause.

4. For the above reasons, we think it beyond dispute that the Commission's interpretation was reasonably supported and therefore binding on the court of appeals under the proper standard of review. We further suggest, however, although we do not think the Court need reach the question, that the court of appeals' decision was erroneous even if it was open to it to interpret the contract for itself.

Ultimately, the court's decision rests on the syllogism that the Atlantic price redetermination was reached by agreement of the parties rather than by arbitration; that such an agreement is a "contract"; that the "purchase" of gas could not be completed

until the price was established; and that therefore the price redetermination was a "contract providing for the purchase * * * of gas" entered into after the specified date. But just as the syllogism plays along the surface of the words, so the result is divorced from any purpose that could reasonably be attributed to the parties to the Shell contract.

Looking to the possible purposes of the parties to the Shell contract—rather than to the technical characterization of the legal phenomena occurring under the Atlantic contract—it becomes clear, we submit, that it was a matter of total unconcern to Shell whether the prevailing price which Texas Gas was obligated by an existing contract to give to another seller was to be determined by reference to an established price index or, because of the difficulty of agreeing upon a proper index, by negotiation subject to arbitration. So also, it could not matter to Shell whether Atlantic and Texas Gas were able to agree upon the prevailing prices or were forced to submit the matter to arbitration. The disparity of treatment between Shell and the other seller is the same regardless of the mechanics by which the other seller's price increase is determined, and a construction of the Shell contract which makes Shell's right to an equivalent increase turn upon such distinctions [14]

[14] There is a suggestion in the opinion below that Shell would be entitled to a price increase in all cases, "possibly" excepting only the case where the existing contract provided for a price increase in a pre-determined amount (*infra*, p. 25). That suggestion is, if anything, even more untenable, since it was only by virtue of the "agreement" on the price increase that the court was able to find a post-1951 "contract" of any kind. An

can only be unsound. The controlling fact is that the price increase given to Atlantic was one that Texas Gas was obligated by a pre-existing contract to give, and it is immaterial whether the precise amount of the increase was fixed by agreement or arbitration.[15]

---

automatic price increase determined by a price index or by arbitration could not properly be described as the entering of a contract for the purchase of gas. And if it could, there would then be no difference at all between an unlimited favored-nation clause and one limited to new contracts.

[15] In the proceedings below, Shell's major contention was that the Atlantic contract was unenforceable because of the lack of a price standard. Although the redetermination provision—providing only that the price was to be "agreed upon * * * after a survey of prevailing prices" in the area, with a failure to agree to be resolved by arbitration—was inartistically worded, the obvious meaning was that the "prevailing prices" were not only to be surveyed but were also to provide the standard for the price to be determined. See R. 13–17. But while we think there is no doubt of the enforceability of the Atlantic contract, that issue is, we submit, immaterial in any event. The parties treated the contract as binding and complied with it, and it is not for Shell, a stranger to the contract, to say that it was not legally enforceable. In limiting the favored-nation clause to future contracts, Shell and Texas Gas were dealing with a practical distinction between existing and future supply arrangements, not with a distinction between contracts which would or would not survive a law suit.

However, even should this Court disagree that the question is immaterial, it would not be required to decide the enforceability of the Atlantic contract. The court of appeals assumed that it was enforceable for purposes of its decision, and it is that decision that presents the questions of general importance of which review is sought. Should the Court reverse that decision, it could then—if it considered the question material—remand the case to the court of appeals to determine the enforceability question.

5. While the scope of judicial review is the question of primary importance presented by this case, the proper interpretation of the favored-nation clause itself has a significance far beyond that normally implicit in such questions. As we have noted, there is a large measure of uniformity of contracting practices in the industry, and clauses similar to those involved here are in widespread use. Of 3320 contracts of independent producers in the Louisiana and Texas Gulf Coast area examined by the Commission staff, 580 (17%) had favored-nation clauses of the new-contract type.[16] On the other hand, 28.8% of the contracts in that area (at a somewhat earlier date) contained price-redetermination clauses.[17] While there are of course great variations in the specific wording of those clauses, an attempt was made to count only those new-contract favored-nation clauses and those price-redetermination clauses which, upon interaction, would present substantially the same problem as that presented here. There are, in fact, already pending before the Commission at least four proceedings involving an equivalent issue.[18]

---

[16] Another 965 (29%) had favored-nation clauses not so limited. The survey included all the contracts of the producers in that area with the 13 major pipelines on file as rate schedules as of the spring of 1959.

[17] Based on the 1547 contracts of producers in that area with the major pipelines on file as of December 1, 1955. For the United States as a whole, of 7,291 producer contracts with interstate pipelines on file as of June 30, 1956, 1800 (24.7%) had redetermination clauses.

[18] *William Herbert Hunt Trust Estate*, Docket No. G–18091; *H. L. Hunt*, Docket No. G–18092; *Hassie Hunt Trust*, Docket No. G–18093, order issued March 20, 1959; *The Atlantic Refining Co.*, Docket No. 18752, order issued June 17, 1959.

Prior to this case, it was, we believe, commonly accepted in the industry that a typical new-contract favored-nation clause was not triggered by a price redetermination under a pre-existing contract.[19] Thus, even if distinctions based on the particular wording of the contracts will in some cases be possible or other courts of appeals decline to follow this case, the decision below has upset the established understanding in the industry and will breed extensive, and in our view unwarranted, litigation.

Finally, the hospitable scope given to new-contract favored-nation clauses by the court below, particularly if followed by other circuits, will inevitably cause substantial increases in the field prices of gas and thus, ultimately, in consumer prices. Because price increases under favored-nation clauses bear no relation to the producer's costs or financial needs, such clauses have little place in a regulated industry, and several proposals have been made to outlaw them or restrict their operation. *E.g.*, H.R. 366, 86th Cong., 1st Sess.; H.R. 8525, 85th Cong., 1st Sess. Even if otherwise lawful, however, such clauses should be strictly con-

[19] Even Shell, after asserting without explanation a right to a 12.5 cent rate in its initial filing in November 1954, seems to have thought so little of the claim that it failed to press it before the Commission until February 1957, in the meantime, at least after April 1955 (R. 7–10, 46–47), accepting without question or reservation the 8.997 cent rate being paid to it by Texas Gas (R. 39–52). The genesis of Shell's claim, moreover, seems to have been primarily a belief that the enforceability of the Atlantic contract might be successfully attacked (see note 15, *supra*), rather than any doubt as to the meaning of the Shell contract.

strued, and there is no warrant for a construction giving to producers, at the expense of consumers, a windfall which, if industry understanding be a guide, was neither contemplated nor bargained-for.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
WAYNE G. BARNETT,
Assistant to the Solicitor General.
SAMUEL D. SLADE,
Attorney.

WILLARD W. GATCHELL,
General Counsel,
HOWARD E. WAHRENBROCK,
Solicitor,
W. RUSSELL GORMAN,
Assistant General Counsel,
Federal Power Commission.

JULY 1959.

APPENDIX

United States Court of Appeals
For the Third Circuit

No. 12,568

SHELL OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT, TEXAS GAS TRANSMISSION CORPORATION, INTERVENOR, AND LOUISVILLE GAS & ELECTRIC COMPANY, INTERVENOR.

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL POWER COMMISSION

Argued October 6, 1958

Before GOODRICH, MCLAUGHLIN and STALEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed January 27, 1959)

By MCLAUGHLIN, *Circuit Judge.*

This case is another in that line wherein the issue has been the effective rate on June 7, 1954 for natural gas sold by a so-called independent producer. That date was when the Supreme Court announced its

decision in Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954). The effect of that decision was to subject independent producers of natural gas to regulation by the Federal Power Commission. The Commission, in implementing the decision, called for filing of rate schedules setting forth "* * * rates * * * effective on June 7, 1954."

What that rate was for Shell Oil Company in its contract with Louisiana Natural Gas Company [1] depends upon the contract-established provisions rather than on the fortuity of rates which were being actually paid on that date. See Natural Gas Pipeline Company v. Federal Power Commission, 253 F. 2d 3 (3 Cir. 1958), cert. den. 357 U.S. 927 (1958). The contract had been entered on May 1, 1951 and for the period in question provided for the sale of gas at 8.997¢ per Mcf, unless "* * * at any time after December 31, 1951, Buyer [Louisiana] * * * [should] enter into a contract providing for the purchase by it of gas * * *" produced and delivered within a fifty mile radius of any delivery point specified. In that event the contract price was to escalate to the same price as that called for by the subsequent contract with the other producer.

Louisiana had already succeeded to rights as purchaser under a contract entered with Atlantic Refining Company, another producer, in 1943. Under that contract buyer agreed to buy specified daily quantities of gas; it was provided that the rights of the parties should continue for the producing life of the field involved but for not more than twenty-five years. In that contract the buyer agreed to pay 2.2¢ net per Mcf for gas received for the first five

[1] Louisiana Natural Gas Company was a subsidiary of Texas Gas Transmission Corporation. On June 30, 1955 it was merged into the parent corporation.

years. No fixed price was established for periods after that, but rather the contract provided:

> "(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.
>
> "(c) During succeeding five-year periods, price to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.
>
> "(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII."[2]

---

[2] Condition XII reads:

"* * * The party desiring such arbitration shall notify the other and in such notice shall name an arbitrator, (sic) ,the arbitrator to be appointed by the other party shall be named within ten (10) days after receipt of such notice of arbitration, and an additional arbitrator shall, within ten (10) days of the appointment of the second arbitrator, be selected by the two (2) arbitrators theretofore appointed, but if one of said parties shall have failed to appoint an arbitrator within the time provided herein, it is expressly understood and agreed that the sole arbitrator shall arbitrate the question alone. If arbitrators shall have been appointed by the respective parties and shall have failed to select the third arbitrator within the above stated time, the third arbitrator shall be appointed by the senior Judge of the 5th Federal Judicial Circuit upon application therefor by either of said parties to the arbitration.

"* * * The decision in writing signed by a majority of the arbitrators shall be final and conclusive with respect to the matter submitted and the parties hereto agree to accept and abide by the same."

r the second five year period had been
r negotiation between the buyer and seller,
eement expired on August 31, 1953. Loui-
tlantic undertook negotiations in Septem-
year for agreeing to a price for the third
riod.

es had difficulty in agreeing. The negotia-
ned five and a half months, finally culmi-
n agreement dated February 17, 1954,
price was established at 12.5¢ per Mcf,
ring tax. Shell thereafter accidentally
this and subsequently notified Louisiana
ntitled under its contract to an escalation
o the same 12.5¢ level.

no dispute that the fifty mile radius re-
f the Louisiana-Shell contract is satisfied.
nt concerning Shell's right to a higher price
ether the Louisiana-Atlantic agreement of
1954 was an "entering of a contract"
ated the price escalation clause of the
hell contract.

ell filed its rate schedule with the Federal
mission pursuant to the Commission's
menting the Phillips decision, the Com-
ther accepted or rejected the submitted
g further explanation by Shell of why
2.5¢ per Mcf. Shell presented that ex-
February, 1957 when it filed for an in-
e to 16.75¢ per Mcf. The reasonableness
is still awaiting hearing. The Commis-
point directed that a hearing be held to
e effective rate on June 7, 1954 under
ntract which it simultaneously accepted

lt of the hearing the examiner found the
e to be 12.5¢. This finding was subse-

quently reversed on November 12, 1957, by the Commission whose decision is here on appeal by Shell.

The clause in the Louisiana-Shell contract which is central to this controversy is one of the type commonly referred to in the trade as a "most favored nation" clause. The usual objective of such a clause is to assure the seller a top price for its gas. Testimony at the hearing before the Commission's examiner was that Louisiana had desired a twenty year contract which was for a term longer than Shell had at that time ever contracted for, at least in that area. Because of difficulty in establishing a price for so long a period, the clause in question was agreed upon. It appears that at the time of contracting Shell knew Louisiana was purchasing gas from Atlantic but was not familiar with the specific terms of that contract. These facts tend strongly to demonstrate that the intention of the parties was for any higher price paid by Louisiana to another producer to trigger a rise on the Shell contract to the same figure except possibly where a pre-existing contract already provided for a settled step-up in price.

If the precise arrangement under the Atlantic contract had been known to Shell, then perhaps Louisiana could argue to more purpose that the wording of the Shell contract (which calls for the "enter[ing of] a contract providing for the purchase * * * of gas") was not intended to trigger escalation following an agreement on price when that agreement was reached under an earlier gas purchase contract which contained a binding agreement subsequently to agree on price. But even then the fact cannot be avoided that, at least for purposes of the favored nation clause, the "entering of a contract for the purchase of gas" has not been accomplished until the price has been estab-

lished. True, Atlantic was obligated to deliver gas for twenty years from 1943 but, just as important, Louisiana was bound to pay for it. And while there may have been enforceable means for settling the rate of payment in the event the parties could not agree, it would nonetheless be true that it was when the price was finally established, by whatever means, that a contract had thereupon been entered. Actually, if the Louisiana-Atlantic agreement of February 17, 1954, was not an entering of a contract we are at a loss as to how it would be properly and legally characterized. The situation fits best into the rubric of an accord itself taken as satisfaction. See 6 Williston on Contracts, §§ 1841, 1846 (rev. ed. 1938). Both parties gave up their rights under the original contract to proceed to arbitration, promising on the one side to pay and on the other side to accept the price reached.

To make the date of the accord retroactive to the date of the original agreement-to-agree is, of course, abstractly conceivable; but for a court to attribute that effect to the Atlantic contract and apply it to the Shell contract in the absence of recognition of this possibility in the Shell contract would take the law out of the realm of business practicalities. It is far more in line with the realities of the situation to say that complete performance of the 1943 contract required the parties to enter into subsequent contracts. The entering into one of those subsequent contracts triggered the escalation clause in the Shell agreement.

We have assumed without deciding that the Atlantic contract of 1943 did in fact impose a binding agreement-to-agree on the price for gas in each of the contract's last four five year periods. Thus it has not been necessary to determine the several ques-

tions raised in connection with the arguments directed to that phase of the case. Of course if the Atlantic contract of 1943 was not a binding agreement-to-agree, that circumstance alone would place the February, 1954 Atlantic contract fully within the terms of the escalation clause in the Shell contract.

The Federal Power Commission order of November 12, 1957 finding Shell's rate with Louisiana on June 7, 1954 to be 8.997¢ per Mcf will be vacated. Because the escalation called for by the contract requires consideration of other factors in determining whether the price to another supplier was indeed higher, the cause will be remanded for consideration of those factors.

United States Court of Appeals for the Third Circuit

No. 12,568

SHELL OIL COMPANY, PETITIONER,

vs.

FEDERAL POWER COMMISSION, RESPONDENT, TEXAS GAS TRANSMISSION CORPORATION, INTERVENOR, LOUISVILLE GAS & ELECTRIC COMPANY, INTERVENOR

JUDGMENT

Present: GOODRICH, MCLAUGHLIN and STALEY, *Circuit Judges:*

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of November 12, 1957 of the Federal Power Commission be, and it is hereby vacated, and the cause remanded with directions to proceed in conformity with the opinion of this Court.

JANUARY 27, 1959.

United States Court of Appeals for the Third Circuit

No. 12,568

SHELL OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT, TEXAS GAS TRANSMISSION CORPORATION, INTERVENOR, AND LOUISVILLE GAS & ELECTRIC COMPANY, INTERVENOR

Present: GOODRICH, MCLAUGHLIN and STALEY, *Circuit Judges:*

ORDER

The petitions for rehearing of Federal Power Commission, Texas Gas Transmission Corporation and Louisville Gas & Electric Company in this case are denied.

By the Court,

[s] MCLAUGHLIN,
Circuit Judge.

Dated: MARCH 4, 1959.

Received and filed Mar. 5, 1959. Ida O. Creskoff, Clerk.

AUG 31
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

Nos. 167 and 170.

TEXAS GAS TRANSMISSION CORPORATION and LOUISVILLE GAS AND ELECTRIC COMPANY, *et al.*,

Petitioners,

v.

SHELL OIL COMPANY,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF SHELL OIL COMPANY IN OPPOSITION.

WILLIAM F. KENNEY
OLIVER L. STONE
2950 R C A Building
30 West 50th Street
New York 20, New York,
Counsel for Shell Oil Company

GEORGE C. SCHOONBRODT, JR.
WILLIAM W. WESTERFIELD, JR.
Shell Building
New Orleans 3, Louisiana,
Of Counsel

TABLE OF CONTENTS.

	PAGE
OPINION AND ORDERS BELOW	1
QUESTIONS PRESENTED	2
STATEMENT	4
ARGUMENT:	
I.—Petitioners misconceive the nature of the price agreement clause of the 1943 Defense Plant contract by erroneously assuming it to be a redetermination clause for the purpose of fixing price increases	9
II.—By starting with a false premise, petitioners have overstated the importance and possible impact of the decision below	11
III.—The Court of Appeals correctly decided that the Louisiana-Atlantic Agreement of February 1954 constituted entry by Louisiana into a contract for the purchase of gas, thus satisfying the Shell clause	14
IV.—The Court of Appeals was fully empowered to decide the question of law for itself	18
The Memphis Decision	24
Uniformity, Agency's Specialized Knowledge and Purposes of the Statute	26
CONCLUSION	28

Table of Cases.

PAGE

American Colortype Co. v. *Continental Colortype Co.* (1903), 188 U. S. 104 19

Colorado-Wyoming Gas Co. v. *F. P. C.* (1945), 324 U. S. 626 18

Far East Conference v. *U. S.*, 342 U. S. 570 24

Federal Power Commission v. *Idaho Power Co.* (1952), 344 U. S. 17, 73 21

Federal Trade Commission v. *Morton Salt Co.* (1948), 334 U. S. 37 21

Federal Communications Commission v. *Pottsville Broadcasting Co.* (1940), 309 U. S. 134 21

Great Northern R. Co. v. *Merchants Elevator Co.* (1922), 259 U. S. 285, 290 ..... 21, 23, 27

Natural Gas Pipeline Co. v. *Federal Power Commission* (1958), 3 Cir., 253 F. 2d 3, cert. den., 357 U. S. 927 23

N. L. R. B. v. *Hearst Publications* (1944), 322 U. S. 111 23

Phillips Petroleum Co. v. *F. P. C.* (1955), 227 F. 2d 470 ..... 22, 23

Phillips Petroleum Co. v. *Wisconsin* (1954), 347 U. S. 672 23

Securities Exchange Commission v. *Chenery Corp.* (1943), 318 U. S. 80 23

Sunray Mid-Continent Oil Co. v. *Federal Power Commission* (1957), 353 U. S. 944 21

T. I. M. E. Inc. v. *U. S.* (1959), ... U. S. ....., 3 L. ed. 2d 952 24

Union Pacific RR Co. v. *Price* (1959), ... U. S. ....., 3 L. ed. 2d 1460, 1471, 27 Law Week 4499 19

United Gas Pipe Line Co. v. *Memphis Light, Gas & Water Div.* (1958), 358 U. S. 103 ..... 14, 21, 24, 26, 29

PAGE

United Gas Pipe Line Co. v. *Mobile Gas Service Corp.* (1956), 350 U. S. 332 ..... 21, 24

United States v. *Western Pacific R. Co.* (1956), 352 U. S. 59 ..... 21, 24

W. P. Brown & Sons Lumber Co. v. *Louisville & N. R. Co.* (1937), 299 U. S. 393 ..... 21, 23

STATUTE.

H. R. 366, 86th Congress, 1st Session, §14(a)(3) 11

Index to Appendix.

Appendix A:

Opinion of the Court 1a
Judgment 7a
Order 8a

Appendix B:

Section 19(b) of the Natural Gas Act 1b

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

Nos. 167 and 170.

TEXAS GAS TRANSMISSION CORPORATION and LOUISVILLE GAS AND ELECTRIC COMPANY, *et al.*,

Petitioners,

v.

SHELL OIL COMPANY,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF SHELL OIL COMPANY IN OPPOSITION.

Opinion and Orders Below.

The opinion of the Court of Appeals (Appendix A hereto) is reported at 263 F. 2d 223. The order of the Commission (R. 133-145)[1] appears at 18 F. P. C. 617; its denial of rehearing (R. 153-162) is reported at 19 F. P. C. 74. The decision of the Presiding Examiner is in the record (R. 118-133).

---

[1] References are to the page numbers shown at the bottom of the pages of the Joint Appendix.

Questions Presented.

This case involves a contract dispute between the parties a privately negotiated gas sale contract. The dispute nters on whether the price escalation clause in a 1951 ntract between Shell Oil Company (Shell), as seller, and ouisiana Natural Gas Company (Louisiana),[2] as buyer, as activated prior to June 7, 1954 by an agreement dated ebruary 17, 1954 between Louisiana and Atlantic Refining ompany (Atlantic).

The price escalation clause in Shell's 1951 gas sale ntract becomes "immediately" operative should the uyer thereafter "enter into a contract providing for the urchase by it of gas" at a higher price within a desigated area. In February 1954, Louisiana entered into a egotiated agreement with another producer (Atlantic) greeing upon the price to be paid Atlantic for gas proced from the area designated in the Shell clause. This 54 agreement resulted from a prior arrangement which, r each five year period after the first five years, required The price . . . to be agreed upon . . . after a survey of evailing prices for gas being sold in similar quantities the southwestern part of Louisiana" (R. 87-88), and iling agreement, to submit the matter to arbitration. A spute arose between Shell and the buyer as to whether e February 1954 agreement was a contract which activated the Shell price clause.

Pursuant to the Commission's regulations requiring oducers' contracts to be filed as "rate schedules",[3] Shell

---

[2] In 1955, Louisiana was merged into its parent, Texas Gas ansmission Corporation, a petitioner here.

[3] 18 C.F.R. 154.91, *et seq.*

so filed its 1951 contract claiming as its initial (June 7, 1954) price, the same price as that fixed in the Louisiana-Atlantic agreement of February 1954.[4] Upon being apprised of the details of the dispute between Shell and the buyer, the Commission convened a hearing for the purpose of determining Shell's "properly effective" June 7, 1954 price. The Presiding Examiner held that the February 1954 agreement was a contract for the purchase of gas which activated the Shell clause (R. 132-133).[5] The Commission reversed its Examiner and held that said agreement was not a "completely new" contract but merely represented action taken pursuant to a pre-existing contract.

The Court of Appeals unanimously held that the February 1954 agreement was a contract which activated the Shell clause. The Court vacated the Commission's order and remanded the cause to the Commission to ascertain whether the price in the February 1954 contract was indeed higher than the Shell price.

The questions presented are:

1. Whether the Court of Appeals was correct in holding that the February 1954 agreement constituted the entering of a contract for the purchase of gas which activated the Shell price clause?

2. Whether in a review proceeding under Section 19(b) of the Natural Gas Act (52 Stat. 821, 15 U. S. C. 717, *et seq.*, see Appendix B herein), the Court of

---

[4] Absent escalation Shell's initial price would be 8.997¢ per Mcf; as escalated it is 12.5¢ per Mcf, both plus tax reimbursement. The 12.5¢ price is the price fixed in the Louisiana-Atlantic agreement of February 1954.

[5] In addition to the Commission's staff, Texas Gas and Louisville (petitioners here) participated in the hearing and filed briefs. Those companies were intervenors in the Court of Appeals.

Appeals was precluded, in the circumstances of this case, from reaching a conclusion different from that reached by the Commission on the question of law involved?

Statement.

The 1951 Shell-Louisiana contract contains the following provision (R. 63-64):

> "If at any time after December 31, 1951, Buyer shall enter into a contract providing for the purchase by it of gas produced from a field or fields located, and delivered to Buyer, within a radius of fifty (50) miles of any point of delivery provided hereunder, Buyer shall forthwith notify Seller of such fact, and if the price per one thousand (1000) cubic feet at any time payable under such other contract is higher than the price payable hereunder, each price payable hereunder which is less than the price payable at the same time under such other contract shall be immediately increased so that it will equal the price payable under such other contract. In determining whether the price payable under such other contract is 'higher' than the price payable for gas under this contract, due consideration shall be given to the provisions of this contract as compared with such other contract as to quality of gas, delivery pressures, gathering and compressing arrangements, quantity, provisions regarding measurement of gas, including deviation from Boyle's Law, taxes payable on or in respect of gas delivered and all other pertinent factors."

Prior to entry into the Shell contract, Louisiana had succeeded to all rights and obligations as purchaser under a 1943 contract which had originally been entered into between Atlantic, as seller, and Defense Plant Corporation,

as buyer (R. 81). Under this 1943 Defense Plant contract, "Seller *agrees to sell*" and "Buyer *agrees to buy*" and pay for certain specified *daily* quantities of gas (R. 82-83).[6] The contract fixes the price for only 5 years (R. 86). No price is fixed subsequent to the first 5 years, nor does this 1943 contract provide a formula or standard by which the parties or the arbitrators shall fix the price. Rather, the contract provides (R. 87-88):

> "(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.
>
> "(c) During succeeding five-year periods, prices to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.
>
> "(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII."[7]

Subject to the foregoing agreement on price at five year intervals, the "rights of the parties" are to continue

---

[6] Italics supplied throughout.

[7] Condition XII reads (R. 93-94):

> "• • • The party desiring such arbitration shall notify the other and in such notice shall name an arbitrator, the arbitrator to be appointed by the other party shall be named

for the producing life of the field but not to exceed 25 years (R. 92).

The price for the period September 1, 1948 to August 31, 1953 (the second five-year period) had been agreed to by negotiations between Atlantic and the then buyer, by agreement dated February 16, 1949 (R. 102-107), but the price under this 1949 agreement expired on August 31, 1953 (R. 104). In the 1949 agreement the parties recited that they were carrying out their desire "that a new agreement be reached as to price" for the period ending August 31, 1953 (R. 103).

In September of 1953 (after the price fixed by the 1949 agreement expired) Atlantic and Louisiana undertook negotiations looking toward agreement upon price for the five-year term of September 1, 1953-August 31, 1958. They had considerable difficulty in reaching agreement. At least four meetings were held in which top representatives from each company attended, and there were numerous telephone conversations. Negotiations lasted approximately 5½ months (R. 12-13, 17-18). The representative of Atlantic (Mr. Bowser) who negotiated the 1943 Atlantic-Defense Plant contract as well as the 1954 Atlantic-Louisiana con-

---

within ten (10) days after receipt of such notice of arbitration, and an additional arbitrator shall, within ten (10) days of the appointment of the second arbitrator, be selected by the two (2) arbitrators theretofore appointed, but if one of said parties shall have failed to appoint an arbitrator within the time provided herein, it is expressly understood and agreed that the sole arbitrator shall arbitrate the question alone. If arbitrators shall have been appointed by the respective parties and shall have failed to select the third arbitrator within the above stated time, the third arbitrator shall be appointed by the senior Judge of the 5th Federal Judicial Circuit upon application therefor by either of said parties to the arbitration.

"* * * The decision in writing signed by a majority of the arbitrators shall be final and conclusive with respect to the matter submitted and the parties hereto agree to accept and abide by the same."

tract testified without dispute that the 1943 contract did not contain a workable formula for ascertaining price (R. 11-13, 16-17). In describing the negotiations leading to the February 1954 contract, Mr. Bowser testified (R. 17):

> ". . . we finally haggled back and forth and said—they said, 'this is as high as we are going', and we said, 'Well, we will see if we can get that agreed to'. And discussed it with top management, reached an agreement, then drew the letter of agreement.
>
> "Q. Could you say you horse-traded it out? A. Oh, yes."

The agreement so reached between Louisiana and Atlantic is embodied in the February 17, 1954 contract which in pertinent part reads (R. 37-38):

> "In accordance with Paragraph III of said contract, (referring to the 1943 contract) it is hereby agreed that the price to be paid by Louisiana Natural Gas Corporation to The Atlantic Refining Company for gas sold and delivered under such contract between September 1, 1953, and August 31, 1958, both inclusive, shall be 12.2 cents net for each 1,000 cubic feet at a pressure base of 15.025 p.s.i.a. of gas received at the central point or points set forth in the original contract, regardless of whether such gas is delivered to a government plant or not; and, in addition, Buyer shall reimburse Seller for all State severance taxes, or similar taxes, which Seller is obligated to pay and has paid to the State of Louisiana on such gas."

The Vice President of Louisiana who participated in negotiating this contract, and who signed it for Louisiana, transmitted the agreement to Atlantic with a letter dated February 22, 1954, stating (R. 38-39):

> ". . . we are enclosing two (2) executed copies of letter *agreement* dated February 17, 1954, *covering the sale of gas,* Acadia Parish, Louisiana."

Shell thereafter accidentally learned of the February 1954 contract and notified Louisiana that it felt entitled to an escalation of its price (R. 7). Louisiana denied Shell's claim, hence the dispute giving rise to this proceeding.

As stated, the Court of Appeals and the Examiner reached a conclusion different from the Commission. The Court, however, remanded the cause to the Commission to consider whether the Atlantic price resulting from the February 1954 contract with Louisiana was indeed higher than the Shell price, as certain factors in that regard had not been reached by the Commission, although the Examiner had fixed Shell's price at the exact figure as the Atlantic price (R. 132-133).[8]

The Court of Appeals reached its decision upon concluding that the February 1954 agreement constituted the entering into a contract for the purchase of gas by Louisiana. This was one of the two main points briefed and argued before the Court. The Court "assumed without deciding" that the 1943 Atlantic-Defense Plant contract did impose a binding agreement-to-agree on price, hence the Court did not reach the "several questions raised in connection with the arguments directed to that phase of the case" (App. A, p. 6a). If certiorari were to be granted and this Court differ with the Court of Appeals, this other issue would still remain to be decided.

---

[8] In 1957 Shell filed under §4(d) of the Act a rate increase to 16.75¢ per Mcf, plus tax reimbursement, resulting from another contract of the buyer. There is no dispute about Shell's contractual right to this escalation. However, this new rate has been suspended under §4(e) of the Act and is subject to a hearing thereunder as to its lawfulness. The instant proceeding does not involve that increase but deals solely with Shell's effective June 7, 1954 price. This question will, of course, affect the floor of Shell's price if the increase is ultimately disallowed.

ARGUMENT.

I.

Petitioners misconceive the nature of the price agreement clause of the 1943 Defense Plant contract by erroneously assuming it to be a redetermination clause for the purpose of fixing price increases.

Petitioners' argument is based upon a false premise.

Petitioners refer to the price agreement clause in the 1943 Atlantic-Defense Plant contract as a "*price redetermination*" clause. They characterize the lengthy negotiations between Atlantic and Louisiana leading to the February 1954 agreement as no more than a *price increase* effected under the *redetermination* clause.[9] This, we submit, is erroneous as it assumes that in reaching the February 1954 agreement, Atlantic and Louisiana did nothing more than apply a definite pricing formula or standard to come up with a price *increase*, and that failing agreement by the parties or a "majority" of the three arbitrators, the immediately preceding effective contract price would continue as the future contract price. But that is not so. A typical price *redetermination* clause in gas contracts is a clause dealing *solely* with price *increases*. It contains a definite standard by which the increase is to be ascertained, normally using the average of the three highest prices being paid by interstate transporters in a designated area; and it leaves the then contract price as the continuing price if such average does not exceed it. The Shell con-

---

[9] The Commission's petition states (p. 17): "The *controlling* fact is that *the price increase* given to Atlantic was one that Texas Gas was obligated by a pre-existing contract to give, and it is immaterial whether the precise amount *of the increase* was fixed by agreement or arbitration." The petition of Texas Gas and Louisville (p. 15) refers to the action as "agreeing upon a *change* in the price, in accordance with an express provision of their . . . contract." We invite the Court's attention to the clause itself to see whether it obligated the giving of *an increase* or called for *a change*

tract, which is in the record, contains a typical price *redetermination* clause. To put these clauses in proper perspective, and to demonstrate their complete dissimilarity, they are set out side by side:

Atlantic Price Agreement Clause (R. 87-88).

"(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.

"(c) During succeeding five-year periods, prices to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.

"(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with

Shell Price Redetermination Clause (R. 64).

"Seller may request a price redetermination for the period commencing January 1, 1962, . . . Such determination is to be made by the parties or, if they are unable to agree, by the arbitrators. . . . Upon such request, the parties, or the arbitrators, shall determine the three (3) highest prices to be paid during such period by operating interstate transporters of natural gas (within a given area) . . . and the prices to be paid during such period shall be the average of such three (3) highest prices per MCF; provided, that in no event shall the price per MCF hereunder be less, during the respective periods, than the price shown above for such period. . . ."

The difference between the clauses is obvious. We submit that petitioners confuse a price *redetermination* clause, pursuant to which price *increases,* gauged by a definite formula, are calculated by a simple arithmetic computation, with a unique and nondescript provision under which the contract price having completely expired, the parties agree to agree upon an entirely new price for their ensuing contract.

The nature of price redetermination clauses in gas contracts is recognized in legislation pending before Congress. H. R. 366, 86th Congress, 1st Session, §14(a)(3) provides:

> "The 'better market clause' or 'price redetermination clause' under the terms of which the price of the natural gas is or may be increased in the event the average of two or more prices which are paid by purchasers in a specified area is greater."

II.

By starting with a false premise, petitioners have overstated the importance and possible impact of the decision below.

Petitioners' confusion of the 1943 Defense Plant price agreement clause with a typical redetermination clause has led them erroneously to magnify this simple contract case into one of potential major significance. Their misreading of the clause has also led them to draw baseless conclusions from their post-hearing appraisal of other contracts on file with the Commission (Comm. Pet. p. 18; Texas Gas and Louisville Pet., pp. 6-8), and to forebode the impact which this case will have on others. It is true, of course, that there are many contracts on file with the Commission having typical price redetermination clauses of the type quoted above from the Shell contract. And it is also true that there are some contracts on file with the Commission which contain clauses similar to the Shell favored-nation

this case will govern the others. The reason it will not is that this case turns on whether the February 1954 agreement constituted entry into a contract for the purchase of gas. That agreement evolved from the peculiarity of the price agreement clause of the 1943 Defense Plant contract. Since that price agreement clause (which was used by the Defense Plant Corporation during its short sojourn into the gas purchasing business during World War II) is unique in the gas purchasing industry, the far-reaching impact and general importance which petitioners would credit to the decision below simply does not exist.[10]

We have searched the Commission's records of gas sale contracts in the Louisiana and Texas Gulf Coast area (the same area encompassed by the Commission Staff survey), *but we have been unable to find a single existing other Defense Plant contract of the type of the Atlantic-Defense Plant contract of 1943.* With the time at our disposal we have examined a substantial number of other contracts on file with the Commission but have been unable to find a single one containing a price agreement clause like that in the Defense Plant contract of 1943.[11] Therefore, this case

---

[10] Our investigation reveals that Defense Plant entered into five contracts during World War II to supply natural gas to certain defense plants near Lake Charles, Louisiana. Only one, the Atlantic 1943 contract, survives. Shell was seller to Defense Plant in one of these old contracts. The instant Shell contract with Louisiana replaced Shell's Defense Plant contract (R. 52-53). It will be noted that this replacement contract has a fixed base price for its full term and did not leave future price to be agreed upon (R. 61-62). Louisiana took over one other contract from Defense Plant and later replaced it with another contract. This is the only other Louisiana (or Texas Gas) contract within a prescribed area including the 1943 Defense Plant contract which we have found which contains a favored-nation clause similar to that contained in the Shell contract. We have searched the Commission's records in vain to find where this other seller has asserted any rights as a result of the February 1954 Louisiana-Atlantic agreement. Any assertion at this late date of a different initial rate by such other seller would doubtless encounter serious obstacles as to its timeliness.

[11] There are a few contracts in which price for some future

cannot possibly have the far-reaching impact and general importance which petitioners would attribute to it.

An additional fallacy in the Commission's treatment of the statistics which it has compiled is that, while recognizing "great variations in the wording of those clauses" (p. 18), it says that it has considered those "new-contract favored-nation clauses and those price-redetermination clauses which *upon interaction*, would present substantially the same problem as that presented here" (p. 18). Thus, not only does the Commission's petition treat the price agreement clause in the 1943 Defense Plant contract as being a price redetermination clause (which it is not), and then assumes that clause to be identical to the large number of true redetermination clauses, but it goes beyond that and decides *ex parte* that there is an "interaction" which "would present substantially the same problem as that presented here" (p. 18). We submit that if a proper analysis were made and if the erroneous assumptions were discarded, the Commission's position in this regard would be found wanting.

The Defense Plant clause, we submit, clearly requires the creation of an entirely new price in order for the parties thereafter to stand as buyer and seller. When Atlantic and Louisiana created the contractual price by their agreement of February 17, 1954, they thereupon entered into a contract for the purchase of gas, thus completely satisfying the contract requirement portion of the Shell clause. And since the arrangement giving rise to the February 1954 contract is unique in the gas industry, the decision below has the sum total precedential value of one.[12]

---

remains as the future contract price if agreement cannot be reached, thus making them nothing but price increase clauses; or the contract also contains a favored-nation clause (which the 1943 Defense Plant contract does not), under which the buyer is continuously obligated to pay the seller at least as high a price as the buyer pays any other producer in a designated area, and this clause appears to have been employed to fix the price.

III.

The Court of Appeals correctly decided that the Louisiana-Atlantic Agreement of February 1954 constituted entry by Louisiana into a contract for the purchase of gas, thus satisfying the Shell clause.

We are not concerned here with a specialized tariff or rate schedule prepared in accordance with standards prescribed by the Commission. Nor is there any question of a rate being just and reasonable. The sole question is whether a non-technically phrased escalation clause appearing in a privately negotiated contract has been activated by a subsequent privately negotiated agreement between the buyer and another producer-seller of gas. It is a type of question which courts would normally be expected to deal with as it involves the resolution of a pure issue of law. And that is the way the Commission treated it.

Pet., pp. 6-7). Each of these, but one, deals with price *increases* (not initial prices) arising under circumstances and contract wording entirely different from that involved here, and in each instance the increase has been suspended under §4(e) of the Act, thus if the increase is put into effect it will be subject to refund. The lone exception is *Phillips* (Docket No. G-10908) involving Phillips' June 7, 1954 rate where its price was to increase if the weighted average royalty rate in a given area exceeded a specified amount. Petitioners do not point to a single pending proceeding involving the issue involved here, and our independent review of the Commission's files fails to reveal any. Of course, the suspension and refund provisions of §4 of the Act fully protect against unjust or unreasonable rates flowing from the increases sought in the other proceedings cited by petitioners.

The Commission's petition (p. 19) and the petition in No. 167 (pp. 8-9) say that the decision below will result in substantial and unwarranted price increases to consumers. That is not the case. Aside from the isolated instance of this case which deals only with Shell's *initial* regulated price, future instances of the applicability of favored-nation clauses will be limited to price *increases* under §4(d) of the Act which will be subject to the suspension and refund provisions of §4(e), thus affording consumers full protection against unjust or unreasonable prices. Somewhat like, but more restricted than, the "superseding" rate schedule clauses involved in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Div.*, 358 U. S. 103, the favored-nation clause is a mere contractual license

The Court of Appeals phrased the gist of this case thus (App. A, p. 4a):

> "The argument concerning Shell's right to a higher price *turns on* whether the Louisiana-Atlantic agreement of February 1954 was an 'entering of a contract' which activated the price escalation clause of the Louisiana Shell contract."

The Commission, in its order, posed the question before it to be (R. 149):

> "The question before us is whether the letter agreement (of February 17, 1954) constitutes a *new* contract for the purchase of gas or whether it merely represents action taken pursuant to the pre-existing 1943 Atlantic contract."

In its order denying rehearing, the Commission summarizes its order in these words (R. 153):

> "It was our view that the letter agreement (of February 17, 1954) was entered into pursuant to a continuing basic contract between Atlantic and Texas Gas' predecessors, so that it would not 'trigger' the escalation clause in Shell's contract as would *a completely new contract* between Texas Gas and a seller of natural gas. . . ."

Thus the Commission put into the Shell clause words which are neither there nor reasonably to be implied.[13] The Court of Appeals (and the Examiner) read the Shell clause as it is written and decided that the February 1954 agreement constituted entry into a contract for the purchase of gas. "Actually", said the Court, "if the Louisiana-Atlantic agreement of February 17, 1954 was not an entering of a contract we are at a loss as to how it would be properly and legally characterized" (App. A, p. 5a).

---

[13] The petitioners likewise insist upon classifying the Shell clause as though it contained the word "new". We do not con-

itioners seem to disapprove of the Court's observa-
f the "usual objective" of price favored-nation
, although the use of price escalation clauses pre-
ur national independence.[14] But to us it does not
o extreme for an appellate judge to say what he
from his judicial experience and common sense to be
usual objective" of a price favored-nation clause
d in ordinary language.[15] Nor does the fact that
han 180 years after price escalation clauses came into
e of them happens to appear in a privately negotiated
et over which an administrative agency learned five
ago that it had jurisdiction, mean that the federal
ate courts have summarily lost their ability to read
lauses and say what they mean and what their *usual*
ve is. In this regard, we do not believe the adminis-
eye has suddenly become keener than the judicial.
observing that it was "abstractly conceivable" to
he February 1954 contract retroactively, the Court,
s to us, was merely announcing that it had given full
eration to the Commission's views, and that as an
et proposition it is sometimes conceivable to view a
et to be retroactively effective.[16] Thus, in some

---

he earliest reference in this country to a price escalation which we have found appears in connection with the pur-
f rifles by the Province of Pennsylvania in 1776. In the *nited States Muskets, Rifles and Carbines* by Col. Arcadi
an (published by The Stockpole Co.) at pp. 44-46, appears a letter dated March 16, 1776 from Committee of Lancaster to Committee of Safety of Province of Pennsylvania, read-
part:

"With some difficulty we at length contracted with our Gunsmiths to supply us with Muskets, bayonets and steel rammers at L4-5s, agreeable to the Pattern set up here. Should the Philada. Prices of Work of equal quality exceed that sum, they were to be entitled to a like advance."

would be proper, we believe, for the Court to take judicial of the fact that the "*usual* objective" of a price favored- clause is to afford equal price treatment to the seller. We f no other objective the clause is designed to accomplish.

instances and for some purposes, a contract to sell a commodity which is subject to a condition precedent (such as fixing of price) might as a fiction, upon ripening into a sale when the condition is supplied, be said to be retroactive to the date of the contract to sell. But it would make an unreal thing of the law to employ that fiction in the circumstances of this case and thus defeat the fundamental coverage of a price favored-nation clause.

Petitioners indicate the view that the 1943 contract contained a definite standard for ascertaining price. Not even the Commission's order purports to go this far. Before the Court of Appeals, the Commission itself was of the view that the 1943 contract did not contain a definite formula or standard, for in its brief there it stated at page 21:

> "Since no fixed price was provided by the Atlantic contract, the arbitration clause was necessary if the contract was not to be merely 'an agreement to agree' ".

The undisputed testimony of the Atlantic official who negotiated the clause is clear that it did not contain a formula[17] (R. 16-17), and the action of the parties shows that in reaching the February 1954 agreement they employed nothing but their unfettered bargaining powers and traded out on a price after negotiating over a period of 5½ months (R. 17-18).

We submit that the decision of the Court of Appeals was correct and there is no need for its review by this Court. We further submit that this is not a case of general

---

ing of the Shell clause called only for entry by the buyer into a contract for the purchase of gas, and that the case "turns on" whether the February 1954 agreement constituted entry into such contract.

[17] The Commission's petition (p. 17, fn. 15) says the Defense Plant contract provided a standard, thus apparently changing the view it held when writing its brief for the court below. The other petitioners (p. 15, fn. *) say our own witness testified the contract contained a definite standard. In addition to the wording of the [illegible] Court is requested to read the testimony of the

importance but, in reality, is nothing more than a contract dispute between Shell and Texas Gas involving a privately negotiated contract in a unique situation which has already been to the decisional level three times and in which Texas Gas, with the aid of the Commission, is merely seeking another decision more to its liking.

IV.

The Court of Appeals was fully empowered to decide the question of law for itself.

In discussing the review power question the petition for the Commission does not accord even a passing nod to §19(b) of the Natural Gas Act, although that section provides "the standards for judicial review" under the Act.[18] The other petitioners give it that but nothing more. Rather, petitioners dwell on the premise that the privately negotiated Shell contract is now classified as a "rate schedule" and that, they seem to feel, gives sanctity to the Commission's reading of the words of this contract even though the words are used therein in an ordinary, non-technical sense.

Section 19(b) of the Act reads in part (App. B):

> "Upon the filing of such petition such court [of appeals] shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. . . . The finding of the Commission as to the facts, if supported by substantial evidence shall be conclusive. . . . The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification. . . ."[19]

---

[18] In *Colorado-Wyoming Gas Co.* v. *F. P. C.* (1945), 324 U. S. 626, at 634, this Court said: ". . . Congress has provided *the standards for judicial review under this Act.* §19(b)."

[19] Section 19(b) of the Act was amended in 1958 (Pub. L. 85-791, §19(b)) to read as shown in App. B hereto, yet Congress did not then change that portion of the section which gives conclusiveness

Nothing in §19(b) indicates a limitation upon the court to decide questions of law for itself.[20] But the Commission says the Court of Appeals could not decide for itself "the meaning of the favored-nation clause" and must accept the Commission's interpretation "if reasonably supported" (Comm. Pet. p. 12). Petitioners in No. 167 say (p. 9) "the court may not decide that the agency's reading is incorrect merely because the court would reach a different result, and it certainly may not find the meaning for the Commission." This latter position confuses fact review with law review, and the Commission's position is little more than that as there would seldom, if ever, be an administrative conclusion of law which could not be said to be "reasonably supported". We cannot visualize where petitioners' views would leave the reviewing courts. At the least, they would rewrite §19(b). At any rate, the court below, while acknowledging that the Commission's view was "abstractly conceivable" (as, we presume, are all administrative conclusions), concluded that it was not reasonable in law.[21]

In differing with its Examiner, the Commission did not employ any specialized knowledge, experience or other unique administrative attribute. It did no more than con-

---

[20] The Administrative Procedure Act (60 Stat. 243, 5 U. S. C. §1009) expressly invests appellate courts with full review power of law questions. See, *Union Pacific RR Co.* v. *Price* (1959), ... U. S. ....., 3 L. ed. 2d 1460, 1471, 27 Law Week 4499 (dissenting opinion) where it is stated:

> "Tolerance of judicial review has been more and more the rule as against the claim of administrative finality. . . . The weight of the Administrative Procedure Act . . . is on the side of judicial review, the finality of administrative action being sanctioned only where it is clear from the statutory scheme that judicial review is precluded."

[21] The Commission's order was based on the erroneous premise that the February 1954 agreement could not itself be a contract. But see *American Colortype Co.* v. *Continental Colortype Co.* (1903), 188 U. S. 104. This court, speaking through Mr. Justice Holmes, held (*ibid.*, at 107):

> "The allegations show that, having the old contract before them, the parties came together under a new agreement, which was determined by reference to the terms of [the old] con- [illegible] but which none the less was present and immediate."

sider words used in their ordinary sense and rendered an opinion based solely upon its view of general principles of law. In denying Shell's request for oral argument, the Commission recognized that it resolved nothing but questions of law. It said (R. 142):

> "Because *the questions of law here involved* have been adequately briefed . . . we do not believe any purpose would be served by holding oral argument as requested by Shell."

And Texas Gas, one of the petitioners here, represented to the Commission that this case involved nothing but the reading of ordinary words. In its answering brief with the Examiner and the Commission, it was stated by Texas Gas that (p. 8):

> "This is *not* a case where the parties have used some technical terminology which has a special meaning so peculiar to the gas industry that no one else would understand it, or where there is a shorthand or cryptic use of business terminology needing definition for the layman. In short, there is nothing puzzling about the escalation provision."[22]

The Commission viewed the case in that light and resolved nothing but a general contract issue. The nature of the issue did not call for administrative specialty or expertness. It called for and got only the resolution of a general legal issue.

---

[22] We have difficulty in reconciling this representation which Texas Gas made to the Commission with its reference in its petition here to the Court of Appeals' decision as "a classic illustration of the vice of unlimited review" (Pet. p. 8), and its statement that the Court "did not make even a gesture of deference to the Commission's special qualifications" (Pet. p. 9). And, especially where it states (p. 9): "Because this question (referring to the question in this case) 'involves matters peculiarly within the area of the Commission's special competence' ". Nor does Texas Gas explain how this special competence was acquired. Perhaps the reason lies in its earlier but incorrect statement (Pet. p. 6): "Here presented is *the first decision* by the full Commission interpreting the meaning of a rate schedule of an independent producer."

Involving neither factors of expertise nor language used in a special or technical sense, the Commission's decision, though perhaps required in this case by the doctrine of primary jurisdiction (*United States* v. *Western Pacific R. Co.* (1956), 352 U. S. 59), did not preclude the appellate court from itself examining the law question and setting aside the Commission's order if such examination lays bare an error of law.[23] And when the Court laid bare the error of law it remanded the cause to the Commission for the administrative determination of whether the Atlantic price was indeed higher than the Shell price, thus carefully observing the administrative function.

The question of construction of a tariff, especially where words are used in their ordinary sense, as here, presents solely a question of law. *Great Northern R. Co.* v. *Merchants Elevator Co.* (1922), 259 U. S. 285, 290; *W. P. Brown & Sons Lumber Co.* v. *Louisville & N. R. Co.* (1937), 299 U. S. 393.[24] And especially is that true of contracts of natural gas companies, as their contract powers are unaffected by the Gas Act (*United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.* (1956), 350 U. S. 332; *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.* (1958),

---

[23] The rule that the court's power is exhausted when it lays bare the agency's error of law (*Federal Power Commission* v. *Idaho Power Co.* (1952), 344 U. S. 17, 73; *Federal Trade Commission* v. *Morton Salt Co.* (1948), 334 U. S. 37; *Federal Communications Commission* v. *Pottsville Broadcasting Co.* (1940), 309 U. S. 134; and *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission* (1957), 353 U. S. 944), of necessity recognizes the power of the court to decide the law question for itself.

[24] *United States* v. *Western Pacific R. Co., supra,* does not limit this rule as the Commission's petition suggests (p. 11). *Western Pacific* holds that the I. C. C. has primary jurisdiction to construe a tariff on file with it, especially where the classification of items as explosive or non-explosive is involved. We do not challenge the Power Commission's primary jurisdiction to construe a gas sale contract on file with it as a rate schedule, when, as here, the initial rate must be ascertained before the floor for a pending increase can be fixed. We maintain that when so doing, especially when words are used in their ordinary sense, the Commission is deciding a pure question of general law, and on review the appellate court has power to decide for itself whether the Commission reached the

358 U. S. 103.[23] The fact that contracts of natural gas companies are said to be "rate schedules" does not detract from their status as privately negotiated contracts, nor does it invest the Commission with a qualification not possessed by the courts to interpret their language.

This rule has been applied to review of an order of the Federal Power Commission by the Court of Appeals for the Tenth Circuit in *Phillips Petroleum Co.* v. *F. P. C.* (1955), 227 F. 2d 470, with *certiorari* denied by this Court (350 U. S. 1005). There the question resolved by the Commission involved an interpretation of its own regulations as well as a gas sale contract of an independent producer. In reversing the Commission, the Court held (227 F. 2d at 476):

> "We hold, therefore, that the [Commission's] orders of October 1st and December 8th were timely; that they were subject to review under Section 19(b) *as presenting purely questions of law involving the construction of a contract.* . . ."

That is precisely this case. And the considerations motivating the denial of *certiorari* in that case would appear to be equally applicable here.

Additionally, when an issue is resolved on the agency's version of applicable legal principles announced by courts (as was the case here), its result must be judged upon the basis of its action, and if the court differs with the legal result reached, the agency's ruling will be set aside.

[23] In the dissenting opinion in *Memphis*, 358 U. S. at 118, it is stated: "The construction of this tariff is a question of law (see *Great No. R. Co.* v. *Merchants Elec. Co.*, 259 U. S. 285, 290)". On this point it does not appear to us that there was disagreement between the majority and the minority, because this Court, as we read *Memphis*, actually did construe the service agreement for itself and concluded that the Commission's determination "was amply supported both factually and legally" and that the Commission had not "overlooked or misapprehended" any of the contentions made in that case (358 U. S. at 114).

Securities Exchange Commission v. *Chenery Corp.* (1943), 318 U. S. 80

In support of its view that even some questions of statutory interpretation have been left to the administrative agencies with but limited review by the courts (p. 9), the Commission's petition cites (fn. 10, p. 9) such cases as *N. L. R. B.* v. *Hearst Publications* (1944), 322 U. S. 111. Whether the same result would have been reached had *Hearst Publications* been decided after the passage of the Administrative Procedure Act need not be examined, as there the Board's construction of the term "employee" under the Labor Act was upheld because the question was one "of specific application of a broad statutory term" (322 U. S. at 131) and ". . . the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and 'reasonable basis in law' " (322 U. S. at 131).

More to the point (in addition to *Great Northern* and *W. P. Brown & Sons, supra*) are such decisions as *Natural Gas Pipeline Co.* v. *Federal Power Commission* (1958), 3 Cir., 253 F. 2d 3, cert. den., 357 U. S. 927, and *Phillips Petroleum Co.* v. *Federal Power Commission, supra,* in each of which the Court reversed the Commission on the question of what was the effective June 7, 1954 rate of a producer. The resolution of these questions by the Commission involved its interpretation of its own regulations and the Gas Act, and the *Phillips* case (227 F. 2d 470) also involved the construction of a filed contract of an independent producer.[26]

The issue on which this case turns is, we believe, unquestionably a pure law question. It required no more than

---

[26] On statutory interpretation, the Commission says nothing of the landmark *Phillips* case (*Phillips Petroleum Co.* v. *Wisconsin* (1954), 347 U. S. 672) in which the Commission's long-standing interpretation of the jurisdictional coverage of the Natural Gas Act was upset because it was legally incorrect.

construing ordinary words used in their ordinary sense, and then determining whether a given set of circumstances constitutes entry into a contract. That, we submit, can be viewed in no other reasonable light than presenting solely a law question.

The Memphis Decision.

Petitioners rely heavily upon *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div.* (1958), 358 U. S. 103,[27] to support their contention that the Court of Appeals was powerless to decide for itself the issue of law involved in this case (Comm. Pet. pp. 10-12; Texas Gas & Louisville Pet. pp. 9, 16).

As we read *Memphis* it seems to us that on its main point it is but a sequel to *Mobile, supra.* On the judicial review point the issue was whether the pipeline's service agreements had actually reserved to it the power to make rate changes. The Commission found the agreements so intended, but the Court of Appeals found it unnecessary to decide the question.

In that setting, this Court found it unnecessary to remand to the Court of Appeals (both parties had asked this Court to decide the case in its posture before the Court), "for consideration of that issue, which involves matters peculiarly within the area of the Commission's special competence and as to which we could hardly be aided by a

---

[27] The Commission also cites (p. 9) *Far East Conference* v. *U. S.*, 342 U. S. 570 and *U. S.* v. *Western Pac. R. Co., supra.* In *Far East Conference* the Court held that the administrative agency "should not be passed over" in cases "raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion. . . ." 342 U. S. at 573. In *T. I. M. E. Inc.* v. *U. S.* (1959), ... U. S. ....., 3 L. ed. 2d 952, this Court recently had occasion to say what it held in *Western Pacific R. Co.*, thus (3 L. ed. 2d at 960):

> "The Government's reliance upon *United States* v. *Western Pacific R. Co.*, 352 U. S. 59 . . . is misplaced. . . . The case decided no more than that referral to the I. C. C. of the issue of 'unreasonableness' . . . was not foreclosed by the fact that affirmative reparation relief before the Commission would have been barred by limitations."

further examination of the record by the Court of Appeals." But then this Court scrutinized the record and found the Commission's determination amply supported "both factually and legally", and that the Commission had not "overlooked or misapprehended" any of the parties' contentions. The Court's language is (358 U. S. at 114):

> "After scrutinizing the record we are satisfied that the Commission's determination as to the meaning of the service agreements here involved was amply supported both factually and legally."

And the Court continues (*ibid*):

> "There is no necessity for us to embark upon a detailed discussion of the various contentions made by the parties, none of which appears to have been overlooked or misapprehended by the Commission."

Then appears what we believe to be the primary reason why the Court credited whatever "special competence" it did to the Commission's findings, namely *(ibid)*:

> "It seems sufficient to say that the record shows that these agreements are typical of the 'tariff-and-service' arrangements *contemplated by Commission Order No. 144,* 18 CFR §154.1 *et seq.* . ."

A footnote (No. 8) gives some of the background to Commission Order No. 144 and reads in part (*ibid*):

> "It is noteworthy that Order No. 144 expressly contemplates that a seller may reserve the 'privilege' of filing rate changes under §4 of the Act. 18 CFR §154.38(d)(3)."

The briefs for petitioners in *Memphis* went to considerable length to show the "superseding" rate schedule clause there involved was designed with Commission cooperation and approval as an effective means of permitting the pipelines to file increased rates whenever they felt the need.

In the Commission's Petition for Certiorari in *Memphis* it is represented (p. 16, fn. 15):

> "It was in response to industry objections that the Commission inserted the 'provisos' in Section 154.38(d)(3) of Order No. 144 . . . which permitted the companies to reserve the right in their service agreements to change rates by filing new schedules."

And in its brief on the merits in *Memphis*, the Commission, in referring to the "superseding" rate schedule provision, said (p. 23):

> "In addition, the pricing provision closely adheres to the language and format of Commission Order No. 144, which clearly provides for such a reservation."

And, *ibid.* at p. 107:

> "By thus *echoing* the Commission's Order (in using the 'superseding' clause), the parties indicated that the contractual phrase should be read in the light of and in conjunction with the Order."

Thus in *Memphis* the contract language construed by the Commission was, in effect, written by it to accomplish a specific objective. In that setting, but unlike the one of this case, the matter may well have been "peculiarly within . . . the Commission's special competence" (358 U. S. at 114).

Uniformity, Agency's Specialized Knowledge, and Purposes of the Statute.

The petition for the Commission emphasizes three factors as to why the Commission's conclusion is binding on the reviewing court, viz. (p. 9): (1) the desirability of uniformity, (2) the bearing of the agency's specialized knowledge upon resolution of the question, and (3) the implicit purposes of the statute.

There is no question but that in a proper setting these factors are entitled to their just due in ascertaining the weight to be accorded the administrative finding. But this case with its unique issue and circumstances is not within that setting because:

(1) Uniformity—In a contract construction case requiring only the reading of words used in their ordinary sense, review by the Courts is available, and uniformity of construction is secured. *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. at 290. On pure questions of law, as here, uniformity results from specialized judicial competence, not administrative competence. The essence of judicial review is to correct administrative error and achieve and maintain uniformity.

(2) Agency's specialized knowledge—The privately negotiated contracts involved here, and the private negotiations between Atlantic and Louisiana culminating in the February 1954 agreement, were such that the task of resolving their meaning and effect did not require any special administrative expertness. Unlike the contracts involved in *Memphis* where the Commission had in effect written the clause there in issue, the contracts involved here resulted from private negotiations and embodied language used in its ordinary sense. The Commission's recently asserted jurisdiction over producers' contracts is not apt to have so quickly given it a knowledge superior to the Court of Appeals in reading such privately negotiated contract language and in deciding that the February 1954 agreement constituted entry into a contract.

(3) The implicit purposes of the statute—The statutory purpose is embodied in §19(b) of the Gas Act. The purpose of the Act is to grant the reviewing court power to review "an order issued by the Commission" (App. B). The only limitation is that fact findings are conclusive where supported by substantial evidence. In dealing with private disputes arising under gas contracts, it would not serve the statutory purpose and

> would contravene the provisions of §19(b), to give finality, where Congress did not, to Commission resolution of such disputes merely because they happen first to come to the decisional level before the Commission because of its custodianship of the documents. If Congress had intended such to be the law, it undoubtedly would have said so in §19(b) when it was dealing specifically with the judicial review question. The fact that it did not, but rather left the review power unlimited except as to fact findings, is an exceedingly strong indication as to the purpose which the statute was intended to accomplish.

There is nothing to suggest that this case involved any specialized administrative competence or the construction of special or technical words. This case emerges from unique circumstances and involves simply the resolution of a dispute between the parties to a privately negotiated contract.

We submit that the Natural Gas Act did not envisage the courts as playing such a secondary role in the review of agency conclusions on questions of law, as petitioners contend for. To distort the Act as petitioners suggest would essentially deprive the Courts of Appeal of their statutory power to review and "to affirm, *modify, or set aside* such order in whole or in part" (App. B), and would leave them only with the chore to "*affirm*".

Conclusion.

We respectfully submit that the decision of the Court of Appeals is correct; that the Court fully observed the Commission's power when it remanded the cause after the Commission's error of law was laid bare; that this case involves essentially the resolution of a private contract dispute, and because of its peculiar circumstances (especially the uniqueness of the price agreement clause of the 1943

Defense Plant contract and the interaction of that clause with the Shell clause) the decision below is not of general importance and cannot affect other cases; nor does the decision below conflict with the *Memphis* decision. No question is presented which would warrant further review by this Court.

Accordingly, the petitions for writs of certiorari should be denied.

Respectfully submitted,

WILLIAM F. KENNEY,
OLIVER L. STONE,
Counsel for Shell Oil Company.

GEORGE C. SCHOENBERGER, JR.,
WILLIAM W. WESTERFIELD, JR.,
Of Counsel.

New York, New York, August, 1959.

APPENDIX A

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 12,568

SHELL OIL COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent,

TEXAS GAS TRANSMISSION CORPORATION,
Intervenor,

and

LOUISVILLE GAS & ELECTRIC COMPANY,
Intervenor.

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL POWER COMMISSION

Argued October 6, 1958

Before:
GOODRICH, McLAUGHLIN and STALEY,
Circuit Judges.

OPINION OF THE COURT

(Filed January 27, 1959)

By McLAUGHLIN, *Circuit Judge.*

This case is another in that line wherein the issue has been the effective rate on June 7, 1954 for natural gas sold by a so-called independent producer. That date was when the Supreme Court announced its decision in Phillips Petroleum Co. *v.* Wisconsin, 347 U. S. 672 (1954). The effect of

that decision was to subject independent producers of natural gas to regulation by the Federal Power Commission. The Commission, in implementing the decision, called for filing of rate schedules setting forth "* * * rates * * * effective on June 7, 1954."

What that rate was for Shell Oil Company in its contract with Louisiana Natural Gas Company[1] depends upon the contract-established provisions rather than on the fortuity of rates which were being actually paid on that date. See Natural Gas Pipeline Company *v.* Federal Power Commission, 253 F. 2d 3 (3 Cir. 1958), cert. den. 357 U. S. 927 (1958). The contract had been entered on May 1, 1951 and for the period in question provided for the sale of gas at 8.997¢ per Mcf, unless "* * * at any time after December 31, 1951, Buyer [Louisiana] * * * [should] enter into a contract providing for the purchase by it of gas * * *" produced and delivered within a fifty mile radius of any delivery point specified. In that event the contract price was to escalate to the same price as that called for by the subsequent contract with the other producer.

Louisiana had already succeeded to rights as purchaser under a contract entered with Atlantic Refining Company, another producer, in 1943. Under that contract buyer agreed to buy specified daily quantities of gas; it was provided that the rights of the parties should continue for the producing life of the field involved but for not more than twenty-five years. In that contract the buyer agreed to pay 2.2¢ net per Mcf for gas received for the first five years. No fixed price was established for periods after that, but rather the contract provided:

> "(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price

---

[1] Louisiana Natural Gas Company was a subsidiary of Texas Gas Transmission Corporation. On June 30, 1955 it was merged into the parent corporation.

to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.

"(c) During succeeding five-year periods, price to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.

"(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII."[2]

A price for the second five year period had been agreed to by negotiation between the buyer and seller, but this agreement expired on August 31, 1953. Louisiana and Atlantic

---

[2] Condition XII reads:

"* * * The party desiring such arbitration shall notify the other and in such notice shall name an arbitrator, (sic) the arbitrator to be appointed by the other party shall be named within ten (10) days after receipt of such notice of arbitration, and an additional arbitrator shall, within ten (10) days of the appointment of the second arbitrator, be selected by the two (2) arbitrators theretofore appointed, but if one of said parties shall have failed to appoint an arbitrator within the time provided herein, it is expressly understood and agreed that the sole arbitrator shall arbitrate the question alone. If arbitrators shall have been appointed by the respective parties and shall have failed to select the third arbitrator within the above stated time, the third arbitrator shall be appointed by the senior Judge of the 5th Federal Judicial Circuit upon application therefor by either of said parties to the arbitration.

"* * * The decision in writing signed by a majority of the arbitrators shall be final and conclusive with respect to the matter submitted and the parties hereto agree to accept and abide by the same."

undertook negotiations in September of that year for agreeing to a price for the third five year period.

The parties had difficulty in agreeing. The negotiations consumed five and a half months, finally culminating in an agreement dated February 17, 1954, whereby the price was established at 12.5¢ per Mcf, plus gathering tax. Shell thereafter accidentally learned of this and subsequently notified Louisiana that it felt entitled under its contract to an escalation of its price to the same 12.5¢ level.

There is no dispute that the fifty mile radius requirement of the Louisiana-Shell contract is satisfied. The argument concerning Shell's right to a higher price turns on whether the Louisiana-Atlantic agreement of February, 1954 was an "entering of a contract" which activated the price escalation clause of the Louisiana-Shell contract.

When Shell filed its rate schedule with the Federal Power Commission pursuant to the Commission's orders implementing the Phillips decision, the Commission neither accepted or rejected the submitted rate, pending further explanation by Shell of why it claimed 12.5¢ per Mcf. Shell presented that explanation in February, 1957 when it filed for an increase in rate to 16.75¢ per Mcf. The reasonableness of that rate is still awaiting hearing. The Commission at this point directed that a hearing be held to determine the effective rate on June 7, 1954 under the Shell contract which it simultaneously accepted for filing.

As a result of the hearing the examiner found the effective rate to be 12.5¢. This finding was subsequently reversed on November 12, 1957, by the Commission whose decision is here on appeal by Shell.

The clause in the Louisiana-Shell contract which is central to this controversy is one of the type commonly referred to in the trade as a "most favored nation" clause. The usual objective of such a clause is to assure the seller a top price for its gas. Testimony at the hearing before the Commission's examiner was that Louisiana had desired a twenty year contract which was for a term longer than

Shell had at that time ever contracted for, at least in that area. Because of difficulty in establishing a price for so long a period, the clause in question was agreed upon. It appears that at the time of contracting Shell knew Louisiana was purchasing gas from Atlantic but was not familiar with the specific terms of that contract. These facts tend strongly to demonstrate that the intention of the parties was for any higher price paid by Louisiana to another producer to trigger a rise on the Shell contract to the same figure except possibly where a pre-existing contract already provided for a settled step-up in price.

If the precise arrangement under the Atlantic contract had been known to Shell, then perhaps Louisiana could argue to more purpose that the wording of the Shell contract (which calls for the "enter[ing of] a contract providing for the purchase * * * of gas") was not intended to trigger escalation following an agreement on price when that agreement was reached under an earlier gas purchase contract which contained a binding agreement subsequently to agree on price. But even then the fact cannot be avoided that, at least for purposes of the favored nation clause, the "entering of a contract for the purchase of gas" has not been accomplished until the price has been established. True, Atlantic was obligated to deliver gas for twenty years from 1943 but, just as important, Louisiana was bound to pay for it. And while there may have been enforceable means for settling the rate of payment in the event the parties could not agree, it would nonetheless be true that it was when the price was finally established, by whatever means, that a contract had thereupon been entered. Actually, if the Louisiana-Atlantic agreement of February 17, 1954, was not an entering of a contract we are at a loss as to how it would be properly and legally characterized. The situation fits best into the rubric of an accord itself taken as satisfaction. See 6 Williston on Contracts, §§ 1841, 1846 (rev. ed. 1938). Both parties gave up their rights under the original contract to proceed to arbitration, prom-

ising on the one side to pay and on the other side to accept the price reached.

To make the date of the accord retroactive to the date of the original agreement-to-agree is, of course, abstractly conceivable; but for a court to attribute that effect to the Atlantic contract and apply it to the Shell contract in the absence of recognition of this possibility in the Shell contract would take the law out of the realm of business practicalities. It is far more in line with the realities of the situation to say that complete performance of the 1943 contract required the parties to enter into subsequent contracts. The entering into one of those subsequent contracts triggered the escalation clause in the Shell agreement.

We have assumed without deciding that the Atlantic contract of 1943 did in fact impose a binding agreement-to-agree on the price for gas in each of the contract's last four five year periods. Thus it has not been necessary to determine the several questions raised in connection with the arguments directed to that phase of the case. Of course if the Atlantic contract of 1943 was not a binding agreement-to-agree, that circumstance alone would place the February, 1954 Atlantic contract fully within the terms of the escalation clause in the Shell contract.

The Federal Power Commission order of November 12, 1957 finding Shell's rate with Louisiana on June 7, 1954 to be 8.997¢ per Mcf will be vacated. Because the escalation called for by the contract requires consideration of other factors in determining whether the price to another supplier was indeed higher, the cause will be remanded for consideration of those factors.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 12,568.

SHELL OIL COMPANY,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent,

TEXAS GAS TRANSMISSION CORPORATION,
Intervenor,

LOUISVILLE GAS & ELECTRIC COMPANY,
Intervenor.

Judgment.

Present:

GOODRICH, McLAUGHLIN and STALEY,
Circuit Judges.

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of November 12, 1957 of the Federal Power Commission be, and it is hereby vacated, and the cause remanded with directions to proceed in conformity with the opinion of this Court.

Attest:

IDA O. CRESKOFF,
Clerk.

January 27, 1959.

RECEIVED & FILED
JAN. 27 1959
IDA O. CRESKOFF
Clerk

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 12,568.

SHELL OIL COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent,

TEXAS GAS TRANSMISSION CORPORATION,
Intervenor,

and

LOUISVILLE GAS & ELECTRIC COMPANY,
Intervenor.

Present:

GOODRICH, McLAUGHLIN and STALEY,
Circuit Judges.

Order.

The petitions for rehearing of Federal Power Commission, Texas Gas Transmission Corporation and Louisville Gas & Electric Company in this case are denied.

By the Court,

McLAUGHLIN,
Circuit Judge.

Dated: March 4, 1959.

RECEIVED & FILED
MAR 5 1959
IDA O. CRESKOFF

APPENDIX B

Section 19(b) of the Natural Gas Act

[as it appears in 15 U. S. C. A. §717r(b) (Supp. 1958)]

[Rehearings; court review of orders]

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals [*] of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to

[*] "Circuit court of appeals" was replaced by "court of

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
SEP 9 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 167.

TEXAS GAS TRANSMISSION CORPORATION and LOUISVILLE GAS AND ELECTRIC COMPANY,

Petitioners,

v.

SHELL OIL COMPANY,

Respondent.

PETITIONERS' REPLY BRIEF

MATHIAS F. CORREA,
63 Wall Street,
New York 5, New York,
Counsel for Texas Gas Transmission Corporation.

GAVIN H. COCHRAN,
713-723 Kentucky Home Life Building,
Louisville 2, Kentucky,
Counsel for Louisville Gas and Electric Company.

ARTHUR L. CORBIN,
Yale Station,
New Haven, Connecticut.

CHARLES F. DETMAR, JR.,
LAWRENCE W. KEEPNEWS,
63 Wall Street,
New York 5, New York

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 167.

TEXAS GAS TRANSMISSION CORPORATION and
LOUISVILLE GAS AND ELECTRIC COMPANY,
Petitioners,

v.

SHELL OIL COMPANY,
Respondent.

PETITIONERS' REPLY BRIEF

Petitioners respectfully submit this Reply Brief in response to two contentions in the Brief in Opposition submitted by Shell Oil Company (Shell). Petitioners believe that Shell's other arguments are fully answered by their petition for certiorari and that of the Federal Power Commission (Commission) in No. 170.

1. Shell's Claim That Atlantic Pricing Provisions Are Unique Has No Basis in Fact and Does Not Really Deny the Major Importance of This Case

Shell advances only one argument in its attempt to prove that this case does not present important questions. Shell does not claim that *the "future contract" requirement of its contract* is unusual, but, instead, asserts that *the Atlantic pricing provisions* are so "unique and nondescript" that

the decision below has little or no general significance (Points I and II).*

Many Pricing Provisions in Shell's Own Contracts Are Essentially the Same as Those in the Atlantic Contract

Saving for a moment the point that this assertion blows up out of all proportion minor facets of the case, one need only sample Shell's own contracts on file with the Commission to find numerous examples of price determination clauses which are, with minor variations, the same as that in the Atlantic contract.

At least 28 other such provisions may be found among Shell's own contracts, of which the following are illustrative:

> "For each one thousand (1,000) cubic feet of gas purchased under this agreement during each of the next five (5) year periods, Buyer shall pay to Seller and Seller shall accept as full compensation therefor, *a price which shall be agreed upon* during the year commencing August 29, 1956, for the five (5) year period extending from August 29, 1957 to August 29, 1962, *and a price which shall be agreed upon* during the year commencing August 29, 1961, for the five (5) year period extending from August 29, 1962 to August 29, 1967, or, *upon failure of the parties to so agree upon the price* for each of said five (5) year periods, such price shall be determined by arbitration in accordance with the provisions of Article XVII, *which price shall be based on the then going price for gas of similar quality and quantity being delivered under similar conditions in comparable North Louisiana fields*, but shall not be less than ten

---

* Shell has "*been unable to find a single existing other Defense Plant Contract of the type of the Atlantic-Defense Plant Contract of 1943*" (emphasis by Shell), or a single other contract "containing a price agreement clause like that" in the Atlantic contract

cents (10¢)." (Agreement of August 8, 1952 with Interstate Natural Gas Co., Inc., Supp. No. 5 to Shell Schedule No. 57.)

"For the fourth five year period *the price shall be the fair and reasonable value* thereof as of the commencement of said period, *taking into consideration the price then being paid for gas of similar quantity and quality sold for similar purposes in the general area of the Clayton Area*, provided, however, that in no event shall such price be less than 10.0883 cents for each 1,000 cubic feet of gas. Six months prior to the commencement of such period such fair and reasonable value *shall be determined by agreement*, but if the parties *are unable to agree* then by a disinterested appraiser * * *." (Contracts of July 15 and January 25, 1950 with Texas Illinois Natural Gas Pipeline Co., Shell Schedule Nos. 2 and 3.)*

These examples reflect extensive use of such flexible price adjustment clauses throughout the industry.

Shell seems to think that there is some magic distinction between this case and cases involving what Shell considers to be a "true" price redetermination clause, that is, one having two attributes: (1) a price floor and (2) a

---

* See also Shell Schedules 21, 41, 61, 62, 69, 75-78, 81, 83, 95, 149, 154, 155, 157-59, 163, 164, 167, 168, 178, 183 and 196. Many schedules use yardsticks such as "fair and reasonable value", "fair market value", "prevailing market price" or "fair, just and reasonable price". Of 186 Shell contracts readily available for examination (out of a total of 211 on file with the Commission) at least 22 have pricing provisions using such terms as "agree", "agreement", "negotiate" or "renegotiate", and at least 22 others use language like "if the parties are unable to agree". Two schedules (21 and 76) do not seem to have any stated price standard whatever. Although time did not permit a survey of every gas purchase contract, a quick check of contracts of other producers confirms that there is nothing "unique" or "nondescript" about these Shell contracts.

"definite" formula to ascertain price, normally the average of the three highest prices being paid (Brief, pp. 9-11).*

The first element relied upon by Shell as an important distinction—whether price might theoretically go down as well as up—is wholly beside the point and represents an exercise in semantics. The academic possibility that there might be a *price decrease* could hardly have anything to do with the opposite question of whether a *price increase* has been triggered under a favored-nation clause in another contract. Whether price can go either of two ways or only one way, the parties still must act to determine the new price.

Shell's second factor, the "definiteness" of the price standard, is a quibble about draftsmanship. Unexplained is Shell's own extensive use of price yardsticks which, as indicated above, do not explicitly require averaging of prices.** Moreover, it is clear that the impact of the

---

* If Shell proves anything by this, it is that there is *a substantial degree of uniformity, as well as important differences*, in gas purchase contracts, which highlights the need for that specialized insight which is able to identify essential uniformity, and to discern really significant differences.

** It is not amiss to note that Texas Gas and Atlantic not only applied the Atlantic price yardstick of "prevailing prices" (which, contrary to Shell's argument, the documentary evidence unmistakably shows that they did do)—but in applying the yardstick *they actually did average various prevailing prices*. See Texas Gas and Atlantic exchange of written data in February 1954 introduced by Shell as Exs. 5 and 6 (R. 124-27). The most that can be said for Shell's claim of vagueness in the Atlantic price standard is that it is an echo of Shell's main argument on the merits, namely, that the 1943 Atlantic contract was not legally enforceable beyond the first five years (compare Shell's argument on the merits at p. 17 of its Brief). It is difficult to see how even a lack of any stated price standard would affect the enforceability of the Atlantic contract since, in such a case, a standard such as "reasonable price" would ordinarily be presumed. See *United States* v. *Swift & Co.*, 270 U. S. 124, 141. In any event, Shell does not mention a case cited in our petition (footnote to p. 15) which upholds the definiteness of the yardstick of "prevailing field price", and also notes that a great many oil and gas contracts use similar standards. *Cities Service Gas Producing Co.* v. *FPC*, 233 F. 2d 726, 727, 730 (10th Cir. 1956), *cert. denied*, 352 U. S. 911.

decision below reaches beyond any peculiarity of draftsmanship.*

Shell Does Not Deny that the Court-Found Meaning of the Favored-Nation Clause Could Affect Hundreds of Other Contracts—or that the Proper Standard of Review is a Vital Matter—or that There is a Growing Number of Disputes Over Interpretation of Rate Schedules

By virtue of Shell's narrow approach in discussing the importance of the case, *i.e.*, focusing on only one of its several aspects, Shell strangely enough does not really deny the major importance of the remaining questions. It merely argues that the Court of Appeals was right on the merits and that it had unlimited de novo jurisdiction (Points III and IV, pp. 14-28). Shell seems to have no real quarrel with the following points:

> 1. That the broadly applicable statements made by the Court of Appeals in finding the meaning of *the Shell favored-nation clause* (as distinguished from what was said about *the Atlantic contract*) would affect the "future contract" limitations appearing in hundreds of other contracts, or in over 1 out of every 3 favored-nation provisions in the Gulf Coast area.

---

* Even the redetermination clause in the Shell contract which Shell attempts to distinguish from that of the Atlantic contract (Brief, p. 10) is swept in by the broad rationale of the court below: "Both parties gave up their rights under the original contract to proceed to arbitration, promising on the one side to pay and on the other side to accept the price reached." The embracing scope of the decision is also due to the fact that under any kind of price determination clause the parties obviously have to take some action and, in some sense, reach an "agreement." *It is the universal custom in the natural gas industry to record every price determination in a "letter agreement".* See, for example, the "letter agreements" in *Phillips Petroleum Co.* v. *FPC*, 227 F. 2d 470, 471-472, 475 (10th Cir. 1955), *cert. denied*, 350 U. S. 1005.

2. That the proper standard to guide the courts in reviewing administrative interpretations of written instruments committed to regulation, is a matter of great consequence.

3. That there is a large and growing number of proceedings before the Commission involving disputes over the interpretation of gas purchase contracts.*

2. Shell's Theory of De Novo Interpretation Has No Place in the Administrative Process

Aside from the merits, Shell's remaining arguments are directed to whether the reviewing court should make a de novo interpretation of the rate schedule.

Shell believes that the "privately negotiated" origin of the present contracts bars the Commission from bringing its accumulated experience to bear, and that uniformity of decision is best achieved by *de novo* judicial decision (Brief,

---

* Since the beginning of June, at least 8 more such proceedings were begun: *Arkansas Fuel Oil Corp.* (Docket No. G-19005); *British-American Oil Producing Co.* (G-19024) *id.* (G-19254); *Sunray Mid-Continent Oil Co.* (G-19090); *Texas Gas Products Corp.* (G-18952); *Texas Hydrocarbon Co.* (G-18951); *Western Natural Gas Co.* (G-18889); *El Paso Natural Gas Co.* v. *Amerada Petroleum Corp., et al.* (G-18900) ("Complaint and Petition for Issuance of Declaratory Order to Terminate Controversies and Remove Uncertainties"). The *El Paso* proceeding brings together a large number of disputes, many arising in other proceedings, which involve hundreds of contracts and scores of producers. The *Western Natural* proceeding is a fifth one raising the instant question about the "future contract" limitation. A further check also brings to light *Atlantic Refining Co.* (G-18753) as presenting the same issue. Thus there are now a total of at least *34 interpretative disputes*, one of which directly involves hundreds of contracts, *and 6 of which appear to involve the meaning of the "future contract"* limitation. See also the proceedings cited in the footnotes at pp. 6-8 of our petition.

pp. 2, 14, 18, 22, 25-28). We suggest that the Court's recent decision in *Pennsylvania R. R.* v. *Day*, 360 U. S. 548 indicates the proper view:

> "We can take judicial notice of the fact that provisions in railroad collective bargaining agreements *are of a specialized technical nature calling for specialized technical knowledge in ascertaining their meaning and application.* Wholly apart from the adaptability of judges and juries to make such determinations, varying jury verdicts would imbed into such judgments varying constructions not subject to review to secure uniformity. Not only would this engender diversity of proceedings *but diversity through judicial construction and through the construction of the Adjustment Board.* Since nothing is a greater spur to conflicts, and eventually conflicts resulting in strikes, than different pay for the same work or unfair differentials, *not to respect the centralized determination of these questions through the Adjustment Board would hamper if not defeat the central purpose of the Railway Labor Act*" (360 U. S. at 553).

We find it hard to understand how Shell can wholly ignore *United States* v. *ICC*, 198 F. 2d 958, 963-64, 975 (D. C. Cir. 1952), *cert. denied*, 344 U. S. 893, which, as we pointed out in our petition (p. 10), conflicts in principle with the present decision, even apart from the *Memphis* case (358 U. S. 103). In the *ICC* case, the District of Columbia Circuit carefully refrained from construing a railroad rate tariff and left the job of interpretation up to the Commission, even though it ruled that the Commission's original interpretation was unsupported and could not stand.

The Commission's Accumulated Experience

Shell's energetic attempt to distinguish the *Memphis* case really falls back upon the unfounded assumptions that the Commission neither has, nor employed here, any specialized knowledge or experience (Brief, pp. 16, 19, 24-26).

Shell nowhere mentions the Commission's expert reliance in its order denying rehearing upon the marked difference in terminology between the present limited favored-nation clause and clauses from other Shell contracts in the record (R. 2151-52).

The Commission's special familiarity with the inner workings of all the segments of the natural gas industry—producers, pipeline companies, distributing companies and consumers—has been obtained from its day to day study of this complex industry over two decades.

Long prior to the 1954 *Phillips* decision this familiarity extended to the practices and needs of gas producers and the provisions employed in gas purchase contracts. For example, in passing upon pre-1954 applications for certificates of public convenience and necessity submitted by the pipeline purchasers seeking to construct required new facilities, it was essential that the Commission determine that the supply of gas originating from the producing fields was adequate to serve the public need.* The Commission's regulations require the pipeline companies to attach copies of their gas purchase contracts as exhibits to their certificate applications. See requirements for what is now "Exhibit H" under Section 157.14(a)(10)(v) of the Regulations under the Natural Gas Act (18 C. F. R.).

---

* For instance, in the first major decision on such a pipeline application, the Commission made a careful study of the adequacy of the natural gas supplies and the various forms of the gas purchase contracts, including pricing features. See *Kansas Pipe Line & Gas Co.*, 2 F. P. C. 29, 40-45 (1939).

Prior to 1954, the Commission and its Staff were therefore required to consider thousands of gas purchase contracts of independent producers and became familiar with all types of flexible price adjustment clauses.*

But, this only represents part of the Commission's pre-1954 familiarity with producing problems. For example, the Commission added substantially to its special knowledge about gas production in the *Natural Gas Investigation* (Docket No. G-580), which extended from 1944 to 1948.

Shell's argument that the process of interpreting a gas purchase contract is solely a matter of "law", oversimplifies the question of the proper standard of review and is contradicted by the fact that the Court of Appeals made findings of subjective intention and business "practicalities."

Conclusion.

It is respectfully submitted that the petitions for certiorari should be granted as presenting questions of general importance.

Not only does de novo judicial interpretation raise significant problems in administering the Natural Gas Act, but the decision below emasculates the widely used "future contract" form of restraint on inflation of field prices. Such a result is obviously a matter of serious public concern comparable to that expressed by the Court in *Atlantic Refining Corp.* v. *Public Service Commission*, 360 U. S. 378, 391-92 with respect to the impact on the consumer of the

* Thus, before 1954, both the Atlantic and the Shell contracts had been introduced in evidence in the hearing in Docket No. G-1578.

rising price plateaus in southern Louisiana and the "triggering" of favored-nation clauses.

Respectfully submitted,

MATHIAS F. CORREA,
63 Wall Street,
New York 5, New York,
Counsel for Texas Gas Transmission Corporation.

GAVIN H. COCHRAN,
713-23 Kentucky Home Life Bldg.,
Louisville 2, Kentucky,
Counsel for Louisville Gas and Electric Company.

ARTHUR L. CORBIN,
Yale Station,
New Haven, Connecticut,

CHARLES F. DETMAR, JR.,
LAWRENCE W. KEEPNEWS,
63 Wall Street,
New York 5, New York,
Of Counsel.

September 9, 1959.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 4 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

Nos. 167 and 170

FEDERAL POWER COMMISSION, TEXAS GAS TRANSMISSION CORPORATION, and LOUISVILLE GAS AND ELECTRIC COMPANY,

Petitioners,

v.

SHELL OIL COMPANY,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS TEXAS GAS TRANSMISSION CORPORATION AND LOUISVILLE GAS AND ELECTRIC COMPANY

MATHIAS F. CORREA,
63 Wall Street,
New York 5, New York,
Counsel for Texas Gas Transmission Corporation.

GAVIN H. COCHRAN,
713-723 Kentucky Home Life Building,
Louisville 2, Kentucky,
Counsel for Louisville Gas and Electric Company.

ARTHUR L. CORBIN,
Yale Station,
New Haven, Connecticut,

CHARLES F. DETMAR, JR.,
LAWRENCE W. KEEPNEWS,
63 Wall Street,
New York 5, New York,
Of Counsel.

March 4, 1960

INDEX

	PAGE
OPINION AND ORDERS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	9
ARGUMENT	11
POINT I. In interpreting the rate schedule de novo and in making its own findings and evaluation of industry usage the court below departed from the proper scope of review	12
POINT II. The Commission's determination was fully supported and it was error to reverse it	17
The terms of the rate schedule	17
The Atlantic price redetermination	20
A. The Commission's determination is fully supported	21
B. The lower court's interpretation is without factual or legal support and is contradicted by the record	25
The lower court's analysis of the record	25
The lower court's rationale is unsound	29
CONCLUSION	31
APPENDIX A—Section 19(b) of the Natural Gas Act	32
APPENDIX B—Section 10(e) of the Administrative Procedure Act	34

TABLE OF CAS

	PAGE
Brassert v. *Clark*, 162 F. 2d 967 (2d Cir. 1947)	24
Cities Service Gas Producing Co. v. *FPC*, 233 F. 2d 726 (10th Cir. 1956), cert. denied, 352 U. S. 911	24
Colorado-Wyoming Gas Co. v. *FPC*, 324 U. S. 626	13
Col-Tex Refining Co. v. *Coffield & Guthrie, Inc.*, 196 F. 2d 788 (5th Cir. 1952)	24
Crolley v. *Tatton*, 249 F. 2d 908 (5th Cir. 1957), cert. denied, 356 U. S. 966	13
Dobson v. *Commissioner*, 320 U. S. 489	15
FTC v. *Algoma Lumber Co.*, 291 U. S. 67	13
Florida v. *United States*, 282 U. S. 194	12
May Metropolitan Corp. v. *May Oil Burner Corp.*, 290 N. Y. 260, 49 N. E. 2d 13 (1943)	24
Pennsylvania R. R. v. *Day*, 360 U. S. 548	15
Phillips Petroleum Co. v. *FPC*, 227 F. 2d 470 (10th Cir. 1955), cert. denied, 350 U. S. 1005	24
Phillips Petroleum Co. v. *Wisconsin*, 347 U. S. 672	4
Red Cross Line v. *Atlantic Fruit Co.*, 264 U. S. 109	24
Slocum v. *Delaware, L. & W. R. R.*, 339 U. S. 239	15
Texas Co. v. *Z. & M. Independent Oil Co.*, 156 F. 2d 862 (2d Cir. 1946)	24
United Gas Pipe Line Co. v. *Memphis Light, Gas and Water Div.*, 358 U. S. 103	13, 25, 30
United States v. *ICC*, 198 F. 2d 958 (D. C. Cir. 1952), cert. denied, 344 U. S. 893	13
United States v. *Western Pacific R. R.*, 352 U. S. 59	15

Statutes

	PAGE
62 Stat. 928, 28 U. S. C. §1254 (1)	2
Natural Gas Act, Section 19(b), 52 Stat. 831 (as amended, 72 Stat. 947), 15 U. S. C. A. §717r(b) (Supp. 1958)	2
Administrative Procedure Act, Section 10(e), 60 Stat. 243, 5 U. S. C. §1009(e)	2

Regulations

FPC Regulations Under the Natural Gas Act, 18 C. F. R. §§154.92-94 (Supp. 1958), 19 Fed. Reg. 4534-37	4, 7

Commission Proceeding

FPC Docket No. 9277	26

Treatises and Articles

Goodrich, *Conflict of Laws* (3d ed. 1949)	23
Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 Harv. L. Rev. 70 (1944)	14
Thayer, *A Preliminary Treatise on Evidence* (1898)	14
3 Williston, *Contracts* §616 (rev. ed. 1936)	14
5 Williston, *Contracts* §1421 (rev. ed. 1937)	24
6 Williston, *Contracts* §1921A (rev. ed. 1938)	24
1 Williston, *Sales* §176 (rev. ed. 1948)	24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

Nos. 167 and 170

FEDERAL POWER COMMISSION, TEXAS GAS TRANSMISSION CORPORATION, and LOUISVILLE GAS AND ELECTRIC COMPANY,
Petitioners,

v.

SHELL OIL COMPANY,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS TEXAS GAS TRANSMISSION CORPORATION AND LOUISVILLE GAS AND ELECTRIC COMPANY

Opinion and Orders Below

The opinion of the Court of Appeals (R. 160)* is reported at 263 F. 2d 223. The order of the Federal Power Commission (Commission) (R. 126) appears at 18 F. P. C. 617, 22 P. U. R. 3d 94; its denial of rehearing (R. 143) is reported at 19 F. P. C. 74, 22 P. U. R. 3d 101.

* References throughout this brief are to the pages of the Transcript of Record printed for use of the Court.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on January 27, 1959 (R. 165). Timely petitions for rehearing were filed on February 20, 1959 and were denied by the Court of Appeals by order dated March 4, 1959 (R. 166).

By orders of Mr. Justice Brennan dated May 25, 1959, the time for filing petitions for a writ of certiorari was extended to and including July 2, 1959 (R. 167-68). Two petitions for a writ of certiorari were duly filed, one by the Commission and the other jointly by Texas Gas Transmission Corporation (Texas Gas) and Louisville Gas and Electric Company (Louisville). Both petitions were granted on October 12, 1959 and the two cases were consolidated (361 U. S. 811; R. 168-69).

The jurisdiction of the Court rests on 62 Stat. 928, 28 U. S. C. §1254(1) and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (as amended, 72 Stat. 947), 15 U. S. C. §717r(b) (1958).

Statutes Involved

The statutes involved are Section 19(b) of the Natural Gas Act and Section 10(e) of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. §1009(e), which are printed in full as Appendices A and B hereto.

Questions Presented

In a contract for the purchase of gas between Shell Oil Company (Shell) and Texas Gas, one of the provisions dealing with price increases was a favored-nation clause

under which the producer, Shell, would be entitled to a price increase should Texas Gas after December 31, 1951 "enter into a contract providing for the purchase by it of gas" at a higher price. Subsequent to December 31, 1951, Texas Gas redetermined price under a pre-existing long-term contract with another producer, The Atlantic Refining Company (Atlantic), which required that the price be so redetermined every five years on the basis of the then-prevailing prices, the redetermined price to be fixed by arbitration should the parties fail to agree. In proceedings under the Natural Gas Act to establish Shell's effective rate, its contract having been filed as a rate schedule, the Federal Power Commission ruled that the price redetermination under Texas Gas' prior contract with Atlantic was not "entering into a contract for the purchase of gas" within the meaning of Shell's favored-nation clause and Shell was therefore not entitled to a price increase. The questions presented are:

1. May a court of appeals, on review of the Commission's order, decide for itself the meaning of the favored-nation clause and make its own evaluation of industry practice and usage and independent findings of fact, or should it accept the Commission's interpretation when reasonably supported?

2. Whether the favored-nation clause of Shell's rate schedule provided for a price increase in these circumstances?

Statement of the Case

The order of the Commission determined the rate effective on June 7, 1954 for sales of gas by Shell. The filing of Shell's contract as a gas rate schedule was required by the Commission's regulations governing independent producers (18 C. F. R. §§154.92-94 (Supp. 1958)), which were issued in accordance with the decision of the Court in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672.

A. The 1951 Shell Contract

The gas purchase contract (Item A,* R. 57-71, 152-59) filed by Shell as a rate schedule was entered into as of May 1, 1951 between Shell and Texas Gas.** Shell is an independent producer of natural gas and the seller under the above rate schedule. Texas Gas, an interstate pipeline company, purchases the gas from Shell for resale in interstate commerce. Both Shell and Texas Gas are "natural gas companies" within the meaning of and subject to the Natural Gas Act.***

The favored-nation provision here in issue reads as follows:

---

* Citations to an "Item" refer to certain documents filed with the Commission, introduced in evidence through incorporation by reference. "Ex" is used to designate exhibits physically put into evidence. Record references are limited to the place in the record where the document or its pertinent provision appears. Generally, the portions of the record which were printed do not include the transcript page at which the document was offered in evidence.

** Shell originally contracted with Louisiana Natural Gas Corporation, a wholly owned subsidiary of Texas Gas. For convenience, "Texas Gas" refers throughout this brief both to the parent company and its subsidiary.

*** Louisville is a principal customer of Texas Gas and became a party to this case because a decision in favor of Shell would have an adverse impact upon it and the ultimate consumers it serves.

> *"If at any time after December 31, 1951, Buyer shall enter into a contract providing for the purchase by it of gas* produced from a field or fields located, and delivered to Buyer, within a radius of fifty (50) miles of any point of delivery provided hereunder, Buyer shall forthwith notify Seller of such fact, *and if the price* per one thousand (1000) cubic feet *at any time payable under such other contract is higher* than the price payable hereunder, each price payable hereunder which is less than the price payable at the same time under such other contract shall be immediately increased so that it will equal the price payable under such other contract. In determining whether the price payable under such other contract is 'higher' than the price payable for gas under this contract, due consideration shall be given to the provisions of this contract as compared with such other contract as to quality of gas, delivery pressures, gathering and compressing arrangements, quantity, provisions regarding measurement of gas, including deviation from Boyle's Law, taxes payable on or in respect of gas delivered and all other pertinent factors." (R. 66-67, Sec. 3)*

B. The 1943 Atlantic Contract and the 1953 Price Redetermination

When Texas Gas entered into the Shell contract, it was a party to a gas purchase contract with Atlantic, which had been entered into in 1943.** This contract provides

---

* Emphasis is supplied throughout this brief.

** It covers the North Tepetate Field, Acadia Parish, Louisiana (Item E, R. 81-96). It was originally entered into by Atlantic and Defense Plant Corporation as of September 1, 1943. Texas Gas purchased the pipeline operated by the Government and on May 11, 1949 became an assignee of the Government's rights and obligations under the gas purchase contract with Atlantic (Item H, R. 105). The 1943 Atlantic contract obligates Texas Gas to purchase up to a daily average of 25,000,000 cubic feet of gas for the producing life of the gas field, but not to exceed 25 years (R. 84, 90-91).

for a fixed price during the first five-year period, and, for the remaining four five-year terms, it stipulates that:

> "(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.
>
> "(c) During succeeding five-year periods, prices to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.
>
> "(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII" (Item E, R. 86).*

In accordance with this price redetermination provision, Texas Gas and Atlantic redetermined the price for the period beginning September 1, 1953, without need of arbitration, at 12.2¢, plus .3¢ severance tax and 1¢ gathering tax per Mcf (Exs. 5-7, R. 38-45). This price was recorded in a brief letter agreement dated February 17, 1954 (Ex. 9, R. 46-47).

---

* Under Condition XII, each party selects an arbitrator, and a third arbitrator is chosen by the two arbitrators selected by the parties (R. 91-92). In the event that the two arbitrators fail to select a third arbitrator, he shall be appointed by the senior judge of the Fifth Federal Judicial Circuit. If one party should fail to designate an arbitrator, the sole arbitrator shall arbitrate the question alone.

C. Administrative Proceedings

The issue before the Commission was whether *price redetermination* in accordance with the terms and in performance of the 1943 contract for purchase of gas constituted post-1951 "enter[ing] into a contract providing for the purchase by [Texas Gas] of gas"—thereby establishing the initial qualification for increasing the price to be paid under the Shell rate schedule.

Although Shell knew of this action in March 1954 (R. 16), it raised no claim to a higher rate until it wrote to Texas Gas in October 1954 (Ex. 2, R. 35-36), after the Commission asserted regulation over independent producers in July (19 Fed. Reg. 4534-37).

On November 18, 1954 Shell tendered for filing with the Commission its contract with Texas Gas as the gas rate schedule. As required by regulation, Shell also submitted the May 1954 Texas Gas credit memorandum showing the price actually being paid (8.997¢ per Mcf) (Item D, R. 81). At the same time it offered a so-called "sample bill" which purported to show a 12.5¢ price, without explaining the basis for such price (Item C, R. 80). This was not a real bill or one ever sent to Texas Gas (R. 11-12).

On January 6, 1955, the Commission refused to accept the "sample bill", and stated that the rate schedule did not reveal any basis for charging a price different from the specified 8.997¢ rate (R. 151).

Shell remained silent for two years thereafter.* On

---

* The record also contains evidence of other actions of Shell inconsistent with its claim to a higher rate, both before and even after it raised the issue and made its original tender for filing with the Commission. Briefly, they are: (1) between March and October 1954, and even as late as 1957, Shell accepted *monthly* credit statements from Texas Gas, each of which specifically stated and applied the untriggered 8.997¢ rate, and cashed *monthly* Texas Gas checks in payment of the credit statements (Ex. 11, R. 48-50); and (2) Shell made statements to the public accountants auditing the Texas Gas books, confirming as correct amounts due Shell which were calculated at the 8.997¢ rate (Ex. 12, R. 50-52, 53-57).

February 11, 1957 Shell proposed a further increase to 16.75¢ per Mcf, and took that occasion to explain to the Commission for the first time that it claimed that its June 7, 1954 rate should have been 12.5¢ per Mcf, rather than the 8.997¢ per Mcf it had been receiving and accepting, on the theory that a price increase has been "triggered" under its favored-nation clause by the Atlantic price redetermination (Item B, R. 74-75).* Thereupon, the Commission set a hearing to determine the rate "properly effective" as of June 7, 1954 (R. 110).

The Examiner issued an initial decision in favor of Shell (R. 112). Exceptions to that decision were filed by Commission staff counsel and by Texas Gas and Louisville. The full Commission unanimously reversed the Presiding Examiner's decision and determined that the favored-nation provision was not triggered by the Atlantic price determination (R. 126).** It denied Shell's application for rehearing (R. 143).

D. Proceedings in the Court of Appeals

On review, the Court of Appeals reversed the Commission's order, and denied petitions for rehearing filed by the Commission, Texas Gas and Louisville*** (R. 160-65, 166).

---

* This filing for the further rate increase to 16.75¢ per Mcf is the subject of a separate proceeding pending before the Commission, and is not in issue here.

** The Commission also ruled, as an alternative ground, that the June 7, 1954 rate was the rate actually being charged and paid, i.e., 8.997¢ per Mcf. This ground was not pressed in the Court of Appeals and is not presented here.

*** The Court of Appeals remanded the proceeding to the Commission—not to reconsider the meaning of the "future contract" requirement—but to determine whether the *second requirement* for triggering was satisfied, namely, whether the Atlantic price was in fact "higher" when due consideration is given to various factors as required by the second sentence of the favored-nation clause (R. 165).

Summary of Argument

1. The lower court departed from the proper scope of its review in making its own independent assessment of "business practicalities" in the natural gas industry, its own de novo evaluation of industry practice and usage with respect to price provisions in rate schedules, and in substituting its own de novo interpretation of the meaning of the rate schedule for that of the Commission. As this Court has recognized, the proper scope of review by the appellate court is to ascertain whether the Commission's determination is reasonably supported. The reviewing court must affirm the Commission's determination where it has proper support.

Shell apparently would have it that this doctrine is inapplicable here because the interpretation of a rate schedule is a "matter of law" and not a subject of the Commission's special competence. Such an argument ignores the fact that the interpretation of a written instrument is essentially a factual determination.

The significance of terminology and the industry's understanding of, for example, "price redetermination" are, moreover, matters peculiarly within the special competence of the Commission. Indeed, interpretation of rate schedules is an integral part of the administrative and regulatory process delegated by Congress to the Commission.

Ad hoc judicial interpretation of rate schedules would be an invitation to chaos in the rate structure of the industry. It is only by the Commission's interpretation of rate schedules, based upon its continuing day-to-day experience with the needs and practices of the industry, that the Commission may achieve predictability and stability of rate

schedules and uniformity in accord with the mandate of the Natural Gas Act.

2. The essential distinction between "price redetermination" and "entering into a contract for the purchase of gas" within the meaning of the instant favored-nation clause is abundantly apparent from the explicit terms of the rate schedule itself. The Commission recognized and understood this distinction. Its understanding, based upon its knowledge of the natural gas industry and the use of terminology in rate schedules was confirmed by its reference specifically to provisions in other long-term contracts to which Shell was a party.

The "price redetermination" between Texas Gas and Atlantic was recognized by the Commission to be exactly that and nothing more. The parties were simply redetermining the price pursuant to the price term of an existing contract—a contract for the purchase of gas which had been entered into in 1943.

The validity of price changes pursuant to the terms of the existing contract and based upon an external standard or through arbitration is well accepted. The Commission's understanding that the Atlantic "price redetermination" was an act *pursuant to* the Atlantic contract and was not the *making of a new contract* for the purchase of gas is entirely in accord with precedent.

The Court of Appeals further committed error in adopting an interpretation of the instant price provision which

violates the explicit terms of the rate schedule itself and is without support in the record.

The instant favored-nation clause is expressly directed to a contract providing for the purchase of gas entered into by Texas Gas after 1951, and only to a higher price under such a future contract. The lower court, however, in interpreting this provision to carry out what it felt to be the "usual objective" of a favored-nation clause—to give Shell a "top price" for its gas—revised the explicit terms of the schedule to impose a new provision for price increases. Its findings, we submit, are without support and its rationale unsound.

Argument

Our brief is addressed to two propositions:

(1) The lower court departed from the lawful scope of its powers of administrative review by making its own de novo evaluation of industry practice and usage and its own findings of fact and by substituting its own de novo interpretation of this rate schedule price provision for that made by the Commission.

(2) The Commission's determination of the meaning of this price provision was entirely supported—both legally and factually—and it was error to reverse it. Moreover, the interpretation adopted by the lower court is contrary to the explicit terms of the rate schedule itself and contrary to the facts of record.

POINT I

In interpreting the rate schedule de novo and in making its own findings and evaluation of industry usage the court below departed from the proper scope of review

It is apparent from the opinion below that the court determined the meaning of the instant price provision on the basis of its own assessment of the "realities of the situation" and "business practicalities" and adopted its interpretation to carry out what it felt was the "usual objective" of a favored-nation clause (R. 163-64).

In the present case the Court of Appeals went well beyond permissible bounds of court review of an agency determination. It not only made its own final and binding determination without giving any weight to the Commission's determination, but it also affirmatively made findings of fact, a task which is exclusively that of the Commission.

Affirmative fact finding by a reviewing court (absent a statutory provision for a trial de novo) has been condemned repeatedly by the Court. Under statutes such as the Natural Gas Act where agency findings are conclusive if adequately supported, the role of fact-finding is one exclusively reserved or delegated to the Commission.

Even if the findings of the Court of Appeals were correct or supportable (which we shall show is not the case here), a reviewing court may not make its own findings. The principle of law was precisely summarized in *Florida* v. *United States*, 282 U. S. 194, 215 (1931):

> "In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it

> may permit. *The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported.*"

See also, e.g., *FTC* v. *Algoma Lumber Co.*, 291 U. S. 67, 73 (1934); *Crolley* v. *Tatton*, 249 F. 2d 908, 911 (5th Cir. 1957), *cert. denied*, 356 U. S. 966.

As applied to the Natural Gas Act, the Court has pointed out that the reviewing court is not authorized "*to make findings and substitute them for those of the Commission.*" *Colorado-Wyoming Gas Co.* v. *FPC*, 324 U. S. 626, 634 (1945).

As the Court implicitly held in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Div.*, 358 U. S. 103, 114-15, the task of the reviewing court is to ascertain whether the Commission's interpretation of a rate schedule is properly supported. Thus, the Court concluded:

> "* * * we are satisfied that the Commission's determination as to the meaning of the service agreements here involved was amply supported both factually and legally."

See also *United States* v. *Interstate Commerce Commission*, 198 F. 2d 958 (D. C. Cir. 1952), *cert. denied*, 344 U. S. 893.

Shell apparently urges that the present issue is purely one of law (Brief in Opposition to certiorari, pages 14-26 and 26-28) and apparently would have it that the interpretation of a rate schedule is not a matter for the Commission's special competence.

While we are here concerned with finding the meaning of written language in a formal instrument and the result should be primarily predicated upon its express language, the interpretation of the meaning of a written provision and the significance of the inferences to be drawn from

terminology to arrive at meaning and purpose are essentially factual determinations. See Thayer, *A Preliminary Treatise on Evidence* 203-04, 206 (1898); 3 Williston, *Contracts* §616 (rev. ed. 1936); Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis,* 58 Harv. L. Rev. 70, 111 (1944).

Moreover, the reasons why interpretation of contracts is sometimes characterized as a "matter of law" in the purely judicial system lend no support to the Shell position. The use of this label denotes an allocation of functions, within the judicial system, as between the judge and jury. This separation of powers apparently exists for two reasons of policy: (1) a presumed lack of sufficient experience on the part of the average juror, and (2) a desire to obtain some uniformity of decision from the fact that various judges will adhere to what they deem to be persuasive published precedents.*

But, in the administrative realm, the experience with the industry is found with the Commission, which also, as a single source of decision, will attain much greater uniformity of interpretation. Thus, to the extent that a distinction between "fact" and "law" is drawn in the administrative field, the way in which such a distinction is drawn, and its meaning and purpose, are very different than in the

---

* *Cf.* Thayer, *A Preliminary Treatise on Evidence* 206 (1898); 3 Williston, *Contracts,* §616 (rev. ed. 1936). Also of modern significance is the procedure, invented by Lord Mansfield and others, of using special juries to obtain expert advice and reports on mercantile usages, which, when *reasonable*, were adopted as foundation stones in the building of interpretive precedents in commercial law. See Thayer, *op. cit. supra,* at 259. This early prototype of the modern administrative process is another reflection that, intrinsically, interpretation of commercial instruments has a factual basis, needs expert guidance and should be a vital part of administering a specialized industry, and that administrative interpretation should not be upset unless it is unreasonable.

purely judicial system. As the Court made clear in *Memphis* (358 U. S. 103) and in *Dobson* v. *Commissioner*, 320 U. S. 489, 499-500 and *United States* v. *Western Pacific R. R.*, 352 U. S. 59, 64-67, the distinction for purposes of administrative law is whether the issue calls for uniform and expert agency treatment.

The Court recently recognized the importance of uniformity in the agency's interpretation of railroad collective bargaining agreements and took judicial notice that their provisions were of a technical nature requiring a specialist to ascertain their meaning. *Pennsylvania R.R.* v. *Day*, 360 U. S. 548, 553. See also, *Slocum* v. *Delaware, L. & W. R.R.*, 339 U. S. 239, 243.

In interpreting rate schedules filed under the Natural Gas Act, the Commission is concerned with the meaning of the language expressly written into the instrument and this task is an integral part of the administrative process committed to the Commission by Congress. Moreover, administrative interpretation secures the twin benefits which the administrative process has to offer, namely, the familiarity of the Commission with the technical problems and practices of the industry being regulated and the uniformity and consistency of interpretation which come from the centralized agency.

Uniformity is obtained through the same provisions being interpreted the same way by the single agency. In an even broader way, overall consistency will emerge in time from a delineation of differences and subdifferences in various clauses, and from taking due account of the interrelationships among them. Of course, experience with the industry must go hand-in-hand with evolving such a body of administrative precedents, for only one who is knowl-

edgeable about the field is able to tell with assurance which clauses are essentially the same, where the differences lie and what the various interrelationships are among the several provisions. Only by such agency regulation may the stability and predictability of gas rate schedules be achieved.

Uniformity of interpretation is particularly desirable in the regulation of the natural gas industry. Although producer gas sales contracts are each individually negotiated with the purchasing pipeline, many contain provisions which are substantially identical. For example, as noted in our petition for certiorari (at p. 8), of the innumerable producer rate schedules containing favored-nation clauses, several hundred also contain a "future contract" limitation comparable to that here involved. In addition, such uniformity facilitates the Commission's discharge of its responsibility, under Section 4(b) of the Act, to eliminate undue discrimination "in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."

The various elements discussed above were aptly summarized in the present proceeding by Commissioner Connole, when he said:

> "Preliminary resort to the Commission is required because the *inquiry is essentially one of fact and of discretion in technical matters; and uniformity in the interpretation of so common a clause as is involved here can be obtained only if its determination is left to the Commission.*" (R. 136)

Ad hoc judicial determination of a rate schedule as if it were nothing more than an unique contract between two private parties is an invitation to chaos in the rate structures

of natural gas companies. This must ultimately operate not only to the injury of the industry but to the ultimate economic injury of the consumer.

POINT II

The Commission's determination was fully supported and it was error to reverse it

In departing from the proper scope of review in this case, the lower court attributed a meaning and purpose to a provision in the Shell rate schedule which not only contradicts the clear intendment of the explicit terms of the schedule itself but is a substantive illustration of the practical wisdom of the rule against trial de novo in a reviewing court.

The instant favored-nation clause was expressly directed to contracts providing for the purchase of gas which Texas Gas might enter into after December 31, 1951.

This "future contract" requirement in the Shell contract was not some accidental or unintended combination of words. The clause was not directed to any higher price under any circumstances. Throughout the favored-nation provision reference is made only to the higher price under such other future contracts. Moreover, the fundamental distinction between "price redetermination" under an existing contract and "entering into a contract providing for the purchase of gas" is consistently reflected in the rate schedule itself.

The terms of the rate schedule

The Shell contract for the purchase of gas is a typical instrument covering acquisition of a large volume of gas over a long period. It necessarily contains detailed provi-

sions as to quality, pressure, billing and payment, warranty of title and other appropriate matters.

Provision is made for a fixed increase in price at given intervals throughout the life of the agreement (Article VI, Section 1, R. 65). In another section—a "price redetermination" clause—provision is made for Shell to obtain an increase in price in 1962 and again in 1967 by agreement between the parties (or arbitration) based upon the average of the three highest prices being paid by various buyers in Shell's area under comparable purchase arrangements (Section 4, R. 67-68).

The favored-nation section also provides for an increase:

> "If at any time after December 31, 1951 Buyer shall enter into a contract providing for the purchase by it of gas . . . and if the price . . . payable under such other contract is higher than the price payable hereunder . . ." (Section 3, R. 66-67).

In the Shell contract, when reference is made to "payment of prices" or an "agreement to pay a price", those words are used.

> "The prices to be paid by Buyer for gas" (Article VI, Section 1, R. 65).
>
> "Buyer agrees to pay in full the present gathering tax . . ." (Section 2, R. 65).

Similarly, when reference is made to price redetermination, those exact words are used:

> "Seller may request a price redetermination . . . Such determination is to be made by the parties or, if they are unable to agree, by the arbitrators" (Section 4, R. 67).

The word "redetermination" also appears in a provision for a redetermination of reserves during the life of the contract (Article II, Section 5, R. 63).

The expression, "enter into a contract for the purchase of gas", does not appear solely in the provision in dispute. This expression (or an equivalent)—entirely different from "price redetermination" and "agreement to pay"—appears elsewhere in the Texas Gas-Shell contract. The context, we submit, demonstrates conclusively the definite meaning and scope of the words "enter into a contract providing for the purchase of gas."

At the outset of this contract, it is provided (R. 57-58):

> "*This Contract*, made and *entered into* as of May 1, 1951 • • •"
>
> "WHEREAS, under date of October 1, 1943 Shell Oil Company, Inc., *entered into a contract for the sale of gas* • • •"
>
> "WHEREAS, • • • Buyer and Seller now desire to rescind said contract and *enter into a new contract for the purchase of gas* • • •"•

There can therefore be no doubt that the phrase "enter into a contract providing for the purchase of gas" means an instrument, such as the Shell contract, *really* "providing for the purchase of gas," by covering the important elements of quality, pressure, etc. The difference between "price redetermination" under an existing contract and

---

• Further proof that the terms of the "future contract" limitation are used as a precise phrase of art and are not some accidental or unintended combination of words, appears within the terminology of the favored-nation clause itself (R. 66-67). The limitation, stated at the threshold of the clause, is woven throughout both sentences by consistent use of the phrase "such other contract", which operates to refer back to and incorporate the limitation. The fact that "contract for purchase of gas" does not mean a bare act of price redetermination, but rather denotes a full-scale contract for purchase containing *all* of the various detailed provisions necessary to the long-term relationship, is also shown by the second sentence of the clause. This sentence specifically refers to those various complex provisions, in requiring that due consideration be given to them in determining whether the price is "higher".

"entering into a contract for the purchase of gas" is thus quite apparent from the carefully drawn terms of the Shell contract itself.

It is in light of this careful and consistent usage of terminology—terms well known in the industry—that the price redetermination in 1954 by Texas Gas and Atlantic *pursuant to a pre-existing contract* must be viewed.

The Atlantic price redetermination

The Atlantic contract for the purchase of gas was "entered into" in 1943 (Item E, R. 81-96). Its price term provided for the payment of a fixed price for the first five years, plus tax reimbursement (R. 85). During succeeding five-year periods, the price to be paid was to be agreed upon "after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana" (R. 86). Should the parties be unable to agree the price was to be determined by arbitration.

In 1953-54, pursuant to this price provision, the Texas Gas-Atlantic price was redetermined. A letter evidencing such redetermination was executed which recites that in 1943 the buyer "entered into a gas purchase contract" with Atlantic and that "In accordance with Paragraph III [the price provision] of said contract" it had been agreed that the price for the third five-year period shall be 12.2¢ plus tax reimbursement (Ex. 9, R. 46).

This act was of no different character than a price redetermination under the Texas Gas-Shell contract (see Item A, R. 67-68). Certainly it was not contemplated under the Shell contract that in 1962 and again in 1967 Texas Gas would enter into a contract for the purchase of gas with Shell. The parties would merely redetermine the price pursuant to the provisions of their existing contract which would continue in full force and effect.

A. The Commission's Determination Is Fully Supported

It was within its setting as part of a gas rate schedule that the "future contract" requirement of the favored-nation provision was considered by the Commission. As is apparent from the terms of the schedule itself, they reflect the interest of both the pipeline and the producer and the needs of a buyer and seller in the gas industry—facts known to the Commission. The significance and interrelation of the various parts of the price term of this schedule—including provisions for fixed increases, price redetermination, and favored-nation increases—must, of course, invoke the special competence of the Commission.

The understanding of the industry, including these contracting parties, of the difference between "price redetermination" under an existing contract as opposed to "entering into a contract for the purchase of gas" is clearly a matter which is the subject of the Commission's knowledge based upon the thousands of rate schedules filed with it under the Natural Gas Act and its day-to-day regulation of the industry.

The Commission found no difficulty in understanding the "future contract" limitation. Unanimously, the Commission found that the limitation required entry into a post-1951 contract for the purchase of gas before the Shell favored-nation clause is triggered and found that the Atlantic price redetermination was not such an act.

The technical accuracy of the Commission's interpretation was moreover confirmed by its reference specifically to various other of Shell's favored-nation provisions (R. 147). The Commission with an understanding of industry usage found a striking and revealing difference between the draftsmanship and pattern of (1) the clause with the "future contract" limitation, and (2) the type without that limitation (R. 147; Item J, R. 106-110).

As the Commission noted, the clear meaning of this "future contract" favored-nation clause and its significance—that it would be operative only as to future contracts for the purchase of gas and not in the event of a price redetermination under existing contracts as well—is demonstrated by the favored-nation clauses in such other long-term gas contracts to which Shell was a party and to which the Commission adverted. For example, in the Shell-Texas Eastern agreement, entered into in 1948, the favored-nation clause contains language in direct contrast with the language of the Shell contract here in dispute. That favored-nation clause provides for increase to any higher price paid under any *existing or future* contract. It begins:

> "If Buyer *has entered into or should hereafter enter into a contract* • • • *for the purchase of gas* • • •" (Item J, R. 107).

The favored-nation clause of the other Shell contracts of record similarly include favored-nation clauses under which a seller, such as Shell, can obtain as high a rate as that paid to any other seller as a result of price redetermination, escalation, or otherwise. Thus, in another long-term contract entered into by Shell in February 1951, the favored-nation clause provides:

> "If at any time the cost per MCF of gas purchased by buyer from any gas producer • • • shall be greater than the cost per MCF of gas purchased hereunder, buyer will increase the price per MCF payable to seller for gas delivered hereunder • • •". • (R. 106.)

• This broad provision also appears in the agreement between Tennessee Gas and Shell Oil and others of January 1950. The clause there provides:

> "If at any time after September 1, 1952 the cost per MCF of gas purchased by buyer • • • shall be greater than the cost per MCF of gas purchased hereunder, buyer will increase the price per MCF to seller for gas delivered hereunder" (R. 108).

See also the agreement between Natural Gas and Shell Oil of February 1950 and its favored-nation provision (R. 109).

There can be no stronger factual evidence of the parties' actual intent and understanding than the explicit terms of their agreement. Here, moreover, the Commission's determination was supported by the substantive evidence of Shell's contracting experience and was borne out by the obvious contrast of the instant provision with broader provisions for price increases which make no distinction between existing and future contracts. In all, over thirty contracts between Shell and other interstate pipeline purchasers of gas were before the Commission (Item J, R. 106).

This finding of the meaning is conclusive because there is not the slightest doubt that Atlantic and Texas Gas were redetermining price in performance of their underlying contract to purchase and were not entering into a new one. The terse 1954 letter recording the redetermined Atlantic price (Ex. 9, R. 46) establishes this, and also demolishes any thought that, as a "business practicality", the parties to the 1943 Atlantic contract were entering into a new contract for the purchase of gas.

The determination of the Commission, has, moreover, entire warrant in law. The process of interpretation, as we have indicated, is essentially a factual question. Accordingly, "the law" of any particular jurisdiction is seldom determinative of the contracting intent of the parties. See Goodrich, *Conflict of Laws,* Section 112, p. 338 ff. (3d ed. 1949).

In any event, the Commission's understanding that the Atlantic "price redetermination" was an act *pursuant to* the Atlantic contract and was not the *making of a new contract for the purchase of gas* is entirely in accord with precedent.

The validity of arbitration or appraisal clauses, as well as of objective price standards, is of course well

accepted.* Their use to make provision for price changes is common in the industry as is well known to the Commission.

As the Commission properly understood, the obligation to pay a price which has been changed in accordance with such a provision rests upon the original contract, of which the price term is an integral part. Thus, in *Phillips Petroleum Co.* v. *Federal Power Commission*, 227 F. 2d 470 (10th Cir. 1955), *cert. denied*, 350 U. S. 1005, the following was said about a price which was recorded:

> "But it was nonetheless in force and effect and was being paid *not by force of letter agreements, but by force of the binding effect of the escalator clauses which operated to fix the prescribed rate in accordance with the formula in the contract. The letter agreements were merely executory of the contract between the parties*" (227 F. 2d at 475).

Furthermore, the understanding of the Commission entirely comports with the Court's recent decision in the

---

* At common law and under sales and arbitration acts, appraisal or arbitration clauses are enforced by the remedy of damages, if not by specific performance. See *e.g.*, *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 121; *Texas Co.* v. *Z. & M. Independent Oil Co.*, 156 F. 2d 862, 866-67 (2d Cir. 1946); 5 Williston, *Contracts* §1421, at 3967-68 (rev. ed. 1937); 6 Williston, *Contracts* §1921A (rev. ed. 1938); 1 Williston, *Sales* §176 (rev. ed. 1948). As to price standards, see, *e.g.*, *Cities Service Gas Producing Co.* v. *Federal Power Commission*, 233 F. 2d 726 (10th Cir. 1956), *cert. denied* 352 U. S. 911; *May Metropolitan Corp.* v. *May Oil Burner Corp.*, 290 N. Y. 260, 265, 49 N. E. 2d 13, 15-16 (1943); *Col-Tex Refining Co.* v. *Coffield & Guthrie, Inc.*, 196 F. 2d 788, 790-91 (5th Cir. 1952). The fact that there may be differences between the parties in applying a yardstick does not prevent the yardstick from being fully binding. See *Brassert* v. *Clark*, 162 F. 2d 967, 971-72 (2d Cir. 1947).

Memphis case (358 U. S. 103). There, the Court affirmed the Commission's determination that new rate schedules filed by the pipeline company did not change the contract with its customers, but merely changed the prices in accordance with the terms of the original service contract. The buyer was bound to pay the new prices because his original contract expressly provided that the price provision was variable and that he should pay the price as changed from time to time in accordance with the terms of the contract.

We submit that the determination of the Commission was amply supported and should have been affirmed.

The Court of Appeals should be reversed, we submit, on the ground that the Commission's determination was amply supported both factually and legally, as in the *Memphis* case (358 U. S. at 114).

B. The Lower Court's Interpretation is Without Factual or Legal Support and is Contradicted by the Record

The lower court's analysis of the record

To carry out what it felt to be the objective of the instant provision—to give Shell a "top price" for its gas—the lower court, of course, did not rely upon the terms of the schedule. Rather, it made certain findings.

The court's ultimate finding was that certain facts "tend strongly to demonstrate that the intention of the parties was for *any higher price*", to trigger a Shell price (with one possible exception) (R. 163).

To this end, the court first found that Texas Gas had desired a 20-year contract which "was for a term longer than Shell had at that time contracted for, at least in that area" and "[b]ecause of the difficulty in establishing a price

for so long a period the clause in question was agreed upon".

The fact of the matter is that even of the contracts now in this record, nine of them were executed by Shell prior to the Texas Gas contract. *Every one of these prior contracts has a stated term of 20 years or more.*•

Moreover, Shell did not exclusively rely upon the favored-nation clause for price increases over the term of the contract. Shell would obtain increases in fixed amounts at certain intervals throughout the contract (Article VI, Section 1, R. 65). Shell could obtain price redetermination in 1962 and again in 1967 if the prevailing prices in its area for comparable arrangements—no matter who the buyer and, no matter how such prices were arrived at—were higher than Shell's then contract price (Section 4, R. 67-68).

The court then apparently reasoned that "any higher price" paid by Texas Gas was intended to trigger a rise in the Shell contract since "at the time of contracting Shell knew (Texas Gas) was purchasing gas from Atlantic but was not familiar with the specific terms of the contract" (R. 163). But, the fact is—which the lower court does not dispute—that at the time of contracting Shell knew that sales were being made by Atlantic *under an existing contract*. It knew that that contract for the purchase of gas from Atlantic had already been entered into.

• The other Shell contracts are not set out in full in the printed Transcript of Record and the excerpts and summary do not cover the provisions for how long they are in effect (Item J, R. 106-10). However, four of the prior, long-term contracts referred to in the text above are those excerpted in the printed record (Shell Rate Schedule Nos. 6, 10, 12 and 18). Of course, these do not represent all of Shell's long-term contracts executed prior to the present one. As the Commission is well aware, contracts for terms of twenty years or more are prevalent throughout the industry (by mid-1956, well over 2,000 rate schedules were in this category (Exhibit 2LC, FPC Docket No. 9277, *et al.*, the so-called "Omnibus Case")).

We submit that knowing there was an existing contract with at least one other seller in this area, when Shell entered into its contract with Texas Gas in May 1951, Shell was entirely alert to the limitation of a favored-nation clause which began:

> "If at any time after December 31, 1951, Buyer shall enter into a contract providing for the purchase by it of gas. . . ".

Thus, the court's analysis of the record is neither supported by the record nor can it support an interpretation which violates the explicit terms of the rate schedule itself.

The court apparently gave no weight to the determination of the Commission made in the light of its undoubted knowledge of the significance of "price redetermination" as opposed to "entering into a contract for the purchase of gas." Moreover, the court apparently gave no weight to the explicit difference between the instant favored-nation clause and those contemplating an increase in price in the event a higher price is paid by the buyer whether or not the increase occurred under an existing or a future contract.

To be compared with the court's assessment of "business practicalities" is the Commission's knowledge of the "practicalities" of the gas industry and the economic significance and impact on existing rate structures of a new price paid for the acquisition of gas. The Commission recognized the obvious and important purpose of the limitation of this favored-nation clause, as in others like it, to future contracts for the purchase of gas.

Thus, under this clause, the triggering of an increased rate to a chain of purchasers is restricted, among other things, to an event over which the pipeline has a measure of control—an event which is to be distinguished from obligatory price increases under fixed-price escalation or "pre-

vailing price" provisions in pre-existing contracts for purchase.

The economic significance to the pipeline of such a limitation is in the right and freedom to weigh the impact of a higher price for the acquisition of gas upon existing rate structures, in choosing whether, when and where to acquire new gas, and at what price.

The economic significance to Shell of this limitation is that if Texas Gas should enter into a contract for the purchase of new gas at a price higher than the Shell price, Shell would then obtain an increase under its favored-nation clause. On the other hand, the prevailing market price, as such, would be obtained by Shell—not under the favored-nation clause—but under its own price redetermination clause which would become operative on the dates specified.

The court further apparently ignored the substantive evidence of the conduct of the parties which was entirely consistent with their understanding of the difference between price redetermination and "entering into a contract for the purchase of gas"—also an industry understanding the Commission's knowledge of which was not disputed.

Thus although Shell learned about the Atlantic price redetermination in March, 1954 (R. 16), it did not notify Texas Gas that it thought its price had been "triggered" until more than six months later in October, 1954 (Ex. 2, R. 35). In its original submission to the Commission in November, 1954, Shell tendered its contract and the actual May, 1954, credit memorandum showing the unescalated rate, together with a "sample" billing at the higher rate (Item C, R. 80). When the Commission requested an explanation (R. 151), Shell waited more than two years before presenting to the Commission its justification for the higher rate (Item B, R. 72-77).

During this same period, from March, 1954, to February, 1957, the credit memoranda submitted by Texas Gas and its checks in payment for the gas under the Shell contract uniformly were based upon the unescalated price provided by that contract (Ex. 11, R. 48-50). In accepting those checks over this extended period, Shell never attempted to preserve any claim to the higher price. Moreover, in six of seven statements made by Shell during this period to public accountants who were auditing the books of Texas Gas and its predecessor, Shell stated that balances due to it as shown by such books, which were calculated on the basis of the unescalated price, were correct (Ex. 12, R. 51-57).

We submit that the decision of the court below can not be based either upon any analysis of the record or the terms of the rate schedule.

On the contrary, if any further evidence were needed of the meaning of the favored-nation clause beyond the explicit terms of the clause itself and the schedule of which it is a part, the evidence of the contract usage of Shell itself and the evidence of the conduct of the parties—all evidence of record—reaffirm that the terms of this provision mean exactly what they say. They will not admit of the interpretation adopted by the court below.

The lower court's rationale is unsound

The lower court also erred, even if, in determining the intention of the parties, it reasoned from what it found to be the legal significance of price redetermination under the Atlantic contract. Its rationale, we submit, is unsound.

Performance of the original contract with Atlantic did not require the parties to enter into subsequent contracts, as the lower court reasoned, but required the parties to perform in accordance with the price term. Their obliga-

tions rested upon the continuing existence of the original 1943 contract.

When, at each fifth anniversary of that contract, Texas Gas and Atlantic redetermined a different price to apply for the subsequent five years, they were not making a wholly new "contract for the purchase of gas". They were mutually determining a change in price, in accordance with an express provision of their original, and still fully operative, contract. A failure to agree on a precise price would not have frustrated the contract nor would it have been a breach of contract; but it would have at once brought into operation the apparatus for arbitration.

This provision is valid and binding on both parties and neither party had the right or the power to impede its inexorable operation. And, if the precise price for any period were determined by the operation of the arbitration clause, it would be as fully effective under the basic contract as if that price had been originally agreed to by the parties.

No one can doubt that Texas Gas would be bound to pay the price determined by arbitration; and its obligation in this respect derives from the original contract and not from any new or subsequent or succeeding contract. A new price fixed by an arbitrator would certainly not be one fixed by a new contract. The same is true of a new price fixed by redetermination as provided in the original contract.

As this court recognized in the recent *Memphis* case, the buyer is bound to pay the new and changed price because his original contract expressly provides that he should.

The novel view adopted by the court below was apparently developed on the basis of that court's special conception of "business practicalities" and "the realities of the situation." The lack of support for such findings demonstrates the wisdom of the rule that reviewing courts

may not interfere with the functions delegated to the administrative agencies and should accept the agency's determination unless it is unsubstantiated.

There is, we submit, no warrant in fact or law for the lower court's reversal of the Commission's determination.

Conclusion

To avoid duplication, we have not repeated in detail all the points made in the brief for the Commission, in which we fully join.

For the reasons stated in both briefs, the decision and judgment of the Court of Appeals should be reversed and vacated, and the order of the Commission should be affirmed.

Respectfully submitted,

MATHIAS F. CORREA,
63 Wall Street,
New York 5, New York,
Counsel for Texas Gas Transmission Corporation.

GAVIN H. COCHRAN,
713-23 Kentucky Home Life Bldg.,
Louisville 2, Kentucky,
Counsel for Louisville Gas and Electric Company.

ARTHUR L. CORBIN,
Yale Station,
New Haven, Connecticut,

CHARLES F. DETMAR, JR.,
LAWRENCE W. KEEPNEWS,
63 Wall Street,
New York 5, New York,
Of Counsel.

March 4, 1960.

APPENDIX A

Section 19(b) of the Natural Gas Act

[Rehearings: court review of orders]

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The

Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28. [*]

---

[*] Sections 346 and 347 of Title 28, referred to in subsec. (b), were repealed by act June 25, 1948, ch. 646, § 39, 62 Stat. 992, eff. Sept. 1, 1948, and are now covered by section 1254 of Title 28, Judiciary and Judicial Procedure.

APPENDIX B

Section 10(e) of the Administrative Procedure Act

[Judicial Review of Agency Action]

[SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—]

(e) *Scope of Review.*

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 [*] of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

[*] Sections 7 and 8 of the Administrative Procedure Act.

Office-Supreme Court, U.S.
FILED
MAR 4 1959
JAMES R. BROWNING, Clerk

LIBRARY

No. 716

In the Supreme Court of the United States

October Term, 1958

FEDERAL POWER COMMISSION, Appellant

v.

SHELL OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

J. LEE RANKIN,
Solicitor General,
WILLIAM J. GRIFFIN,
Assistant to the Solicitor General,
DANIEL M. FRIEDMAN,
ARNOLD H. GUTTMAN,
ROBERT B. HUMMEL,
Attorneys,
Department of Justice, Washington 25, D.C.

WILLIAM W. SANDERSON,
General Counsel,
EDWARD G. VILLANUEVA,
Solicitor,
W. KENNETH DAVIS,
Assistant General Counsel,
Federal Power Commission,
Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
Summary of argument	9
Argument	15
I. Judicial review of the Commission's interpretation of a contract filed as a rate schedule is limited to a determination whether it is reasonably supported	16
A. Since the Commission's construction of the "favored-nation" clause is based upon the agency's expertise in the highly technical natural gas business, such interpretation is subject to only limited judicial review	16
B. Settled principles governing the relationship between courts and agencies justify restricted review of the Commission's interpretation of the Shell "favored-nation" clause	20
II. The Commission's construction of the Shell "favored-nation" clause as not applicable to price redeterminations under pre-existing contracts was reasonable	29
A. The Shell "favored-nation" clause was not intended to cover price redeterminations under pre-existing contracts	31
1. There is a basic difference in economic effect between natural gas "favored-nation" clauses that are triggered by the payment of any higher price, and those triggered only when the buyer enters into a new contract	31

Argument—Continued

2. The Commission correctly construed the Shell "favored-nation" clause here involved as triggered only by the execution of a new contract for the purchase of gas ..... Page 36

3. The price redetermination under the Atlantic contract did not constitute the "enter[ing] into" of a new gas-purchase contract within the meaning of the Shell "favored-nation" clause 39

B. The Commission's interpretation of the Shell "favored-nation" clause furthers the purpose of the Natural Gas Act to protect the ultimate consumers 40

III. Even if the question whether the Atlantic price redetermination triggered the Shell "favored-nation" clause were open to *de novo* judicial examination, the court of appeals' ruling is erroneous 42

A. The Shell "favored-nation" clause applies only when the buyer enters into a new gas-supply contract, and not when the price under a pre-existing contract is redetermined 42

B. The Atlantic price redetermination was not the entering into of a new contract for the purchase of gas within the meaning of the Shell "favored-nation" clause 44

Conclusion 51

Appendix 52

CITATIONS

Cases:

Aitchison v. *Anderson*, 183 F. 2d 922 50

Col-Tex Refining Co. v. *Coffield & Guthrie, Inc.*, 196 F. 2d 788 50

Cities Service Gas Producing Co. v. *Federal Power Commission*, 233 F. 2d 726, certiorari denied, 352 U.S. 911 50

Colorado-Wyoming Gas Co. v. *Federal Power Commission*, 324 U.S. 626 16

Cases—Continued

Page

Dobson v. *Commissioner*, 320 U.S. 489 ..... 19, 22, 26
Far East Conference v. *United States*, 342 U.S. 570 .... 10, 18–19, 20, 24
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U.S. 134 16
Federal Power Commission v. *Colorado Interstate Gas Co.*, 348 U.S. 492 17
Federal Power Commission v. *Hope Natural Gas Co.*, 320 U.S. 591 ..... 13, 40
Federal Power Commission v. *Interstate Natural Gas Co.*, 336 U.S. 577 40
Federal Trade Commission v. *Algoma Lumber Co.*, 291 U.S. 67 16
General American Tank Corp. v. *El Dorado Terminal Co.*, 308 U.S. 422 24
General Foods Corp. v. *The Felipe Camarao*, 172 F. 2d 131, certiorari denied, 337 U.S. 908 49
Gray v. *Powell*, 314 U.S. 402 22
Interstate Power Co. v. *Federal Power Commission*, 236 F. 2d 372, certiorari denied, 352 U.S. 967 17
Mississippi Valley Barge Line Co. v. *United States*, 292 U.S. 282 22
National Labor Relations Board v. *Hearst Publications*, 322 U.S. 111 ..... 22, 23, 26, 28
Natural Gas Pipeline Co. v. *Federal Power Commission* 253 F. 2d 3, certiorari denied, 357 U.S. 927 7
Nelson v. *Chicago Mill & Lumber Corp.*, 76 F. 2d 17 49
O'Leary v. *Brown-Pacific-Maxon*, 340 U.S. 504 ..... 22, 27
Pennsylvania R. Co. v. *Day*, 360 U.S. 548 26
Phillips Petroleum Co. v. *Federal Power Commission*, 227 F. 2d 470, certiorari denied, 350 U.S. 1005 47
Phillips Petroleum Co. v. *Wisconsin*, 347 U.S. 672 ..... 3, 17, 40, 49
Rochester Telephone Corp. v. *United States*, 307 U.S. 125 ..... 22, 28
Securities & Exchange Commission v. *Associated Gas & Electric Co.*, 99 F. 2d 795 18
Securities & Exchange Commission v. *Chenery Co.*, 332 U.S. 194 16
Shields v. *Utah Idaho R. Co.*, 305 U.S. 177 ..... 22, 28
Sinclair Refining Co. v. *Gutowski*, 195 F. 2d 637, certiorari denied, 344 U.S. 821 49

Cases—Continued Page

South Chicago Coal & Dock Co. v. *Bassett*, 309 U.S. 251.. 22, 28
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U.S. 381.. 22, 28
Texas Co. v. *Z. & M. Independent Oil Co.*, 156 F. 2d 862.. 50
Thompson v. *Texas Mexican R. Co.*, 328 U.S. 134.. 24
Unemployment Compensation Commission v. *Aragon*, 329 U.S. 143.. 10, 18, 22, 28
United Fuel Gas Co. v. *Columbian Fuel Corporation*, 165 F. 2d 746.. 50
United Gas Pipe Line Co. v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, reversing 250 F. 2d 402.. 11, 17, 20–22, 25
United States v. *Interstate Commerce Commission*, 198 F. 2d 958, certiorari denied, 344 U.S. 893.. 22–23
United States v. *Morgan*, '07 U.S. 183.. 29
United States v. *Western Pacific R. Co.*, 352 U.S. 59.. 11, 19, 24–25, 26, 28
Whiting Stoker Co. v. *Chicago Stoker Corp.*, 171 F. 2d 248, certiorari denied, 337 U.S. 915.. 49

Statute:

Natural Gas Act (52 Stat. 821, 15 U.S.C. 717, *et seq.*).. 3, 16
Section 4(c).. 52
Section 4(d).. 18, 52
Section 4(e).. 4
Section 19(b).. 52

Miscellaneous:

Brown, *Law and Fact in Judicial Review* (1943), 56 Harv. L. Rev. 899.. 28
Cooper, *Administrative Justice and The Role of Discretion* (1938), 47 Yale L. Journal 577.. 28
6 Corbin, *Contracts* (1951 ed.) § 1276.. 49
Federal Power Commission's Regulations under the Natural Gas Act, 18 C.F.R. 154.91, *et seq*.. 3, 18
H. Doc. No. 342, 84th Cong., 1st Sess., p. 102, Cong. Rec. 2897–2898.. 41
H.R. 6645, 84th Cong., 1st Sess.. 41
H. Rep. No. 992, 84th Cong., 1st Sess.:
pp. 8–9.. 33
p. 9.. 41
Hearings before the House Interstate and Foreign Commerce Committee on H.R. 4560, 84th Cong., 1st Sess., pp. 82–87.. 41

Miscellaneous—Continued

	Page
Hearings before the Senate Interstate and Foreign Commerce Committee on S. 712, *et al.*, 84th Cong., 1st Sess., pp. 134–137, 1593–1619	41
Jaffe, *Judicial Review: Question of Law* (1955), 69 Harv. L. Rev. 239	28
Landis, *The Administrative Process* (1951), p. 152	28
Paul, *Dobson* v. *Commissioner: The Strange Ways of Law and Fact* (1944), 57 Harv. L. Rev. 753	28
Report of the Attorney General's Committee on Administrative Procedure (1941), pp. 88–90	28
Rules of the United States Court of Appeals for the Third Circuit, Rule 18(7)	31
S. 1853, 84th Cong., 1st Sess	41
S. Rep No. 1219, 84th Cong., 1st Sess.:	
Pp. 7–9	41
Pp. 11–12	41
P. 22	41
Stern, *Review of Findings of Administrators, Judges and Jurors: A Comparative Analysis* (1944), 58 Harv. L. Rev. 70	28

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 170

FEDERAL POWER COMMISSION, PETITIONER

v.

SHELL OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 160–165) is reported at 263 F. 2d 223. The opinions and orders of the Federal Power Commission (R. 126–137, 143–150) are reported at 18 F.P.C. 617 and 19 F.P.C. 74.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1959 (R. 165–166). A timely petition for rehearing was denied on March 4, 1959 (R. 166). By order of Mr. Justice Brennan, dated May 25, 1959, the time within which to file a petition for a writ of certiorari was extended to and including July 2, 1959. The petition for a writ of certiorari was filed on July 1, 1959, and was granted on October 12, 1959 (R. 169).

361 U.S. 811. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and § 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

The "favored-nation" clause of a contract for the sale of natural gas provided that the producer would be entitled to a price increase should the pipeline thereafter "enter into a contract providing for the purchase by it of gas" at a higher price. The pipeline thereafter agreed to a higher price under a pre-existing long-term contract with another producer which required that the price be redetermind every five years on the basis of the then-prevailing prices, the price to be fixed by arbitration should the parties fail to agree. In proceedings under the Natural Gas Act to determine respondent's effective rate, its contract having been filed as a rate schedule, the Federal Power Commission held that the price redetermination under the pipeline's prior contract with the other producer was not a new contract for the purchase of gas within the meaning of respondent's "favored-nation" clause and that respondent was not entitled to a price increase. The questions presented are:

1. Whether a court of appeals, on review of the order, may decide for itself the meaning of the "favored-nation" clause of respondent's contract or must accept the Commission's interpretation, if reasonably supported.

2. Whether the "favored-nation" clause of respondent's contract provided for a price increase in these circumstances.

STATUTE INVOLVED

Pertinent provisions of the Natural Gas Act (52 Stat. 821, 15 U.S.C. 717, *et seq.*) are set forth in the Appendix, *infra,* p. 52 *et seq.*

STATEMENT

1. Shell Oil Company ("Shell"), an independent producer of natural gas, sells gas produced in Southern Louisiana to the Texas Gas Transmission Corporation ("Texas Gas") under a 20-year contract (the "Shell contract") executed in 1951 (R. 57–71).[1] After the decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, holding sales of natural gas in interstate commerce by independent producers to be subject to the Natural Gas Act (52 Stat. 821, 15 U.S.C. 717, *et seq.*), the Federal Power Commission directed such producers to file rate schedules showing their rates in effect on June 7, 1954, the date of that decision (18 C.F.R. 154.91, *et seq.*). In November 1954, Shell duly filed, as its rate schedule, its contract with Texas Gas, together with, as required, a statement showing the rate actually being received on that date, which was 8.997 cents per Mcf (R. 110, 127). Shell also filed, however, a "sample" billing statement purporting to show that the correct rate was 12.5 cents (*ibid.*; R. 80). The Commission, in January 1955, notified Shell that it would not accept the filing until an explanation of the effective rate was provided (R. 151). Shell took no action until February 1957, when, in filing a prospective rate change for the sale to 16.75 cents, it

[1] The contract was originally with Texas Gas' wholly-owned subsidiary, Louisiana Natural Gas Corporation. The corporations merged in June 1955 (R. 127).

aimed that its effective rate on June 7, 1954, was 2.5 cents by virtue of a price increase to which it had ecome entitled in 1953 under the "favored-nation" ause of its contract with Texas Gas (R. 72–77, 127).

The Commission suspended the proposed 16.75-cent ate pending a determination of its reasonableness[2] nd directed a hearing to determine the rate in effect n June 7, 1954 (R. 110–111, 127–128). After hearngs, the Commission determined that the effective ate in 1954 was 8.997 cents and directed that a revised illing statement so showing be filed with the contract s the rate in effect on June 7, 1954 (R. 134–135).[3] The court of appeals set aside the order, and reanded the case to the Commission (R. 160–165).

2. Admittedly, the rate in effect under the contract rior to 1953 was 8.997 cents, and the sole question efore the Commission was whether Shell had become ntitled to an increase under its "favored-nation" lause in 1953. The facts relevant to that issue are as ollows:

The "favored-nation" clause of the 1951 Shell contract provided (R. 66–67):

> 3. If at any time after December 31, 1951, Buyer [Texas Gas] shall enter into a contract

---

[2] That proceeding is still pending before the Commission. The new rate (based upon another purchase of gas by Texas Gas admittedly within the favored-nation clause) went into effect after the expiration of the five-month suspension period, subject to the Commission's power to order refunds if the increased rate is ultimately found to have been unjustified. See 4(e) of the Act, 15 U.S.C. 717c(e).

[3] The contract itself had been accepted for filing in the order directing the hearing, with only the filing of the required billng statement being held in abeyance (R. 111).

> providing for the purchase by it of gas produced from a field or fields located, and delivered to Buyer, within a radius of fifty (50) miles of any point of delivery provided hereunder, Buyer shall forthwith notify Seller [Shell] of such fact, and if the price per one thousand (1,000) cubic feet at any time payable under such other contract is higher than the price payable hereunder, each price payable hereunder which is less than the price payable at the same time under such other contract shall be immediately increased so that it will equal the price payable under such other contract. * * *

At the time the Shell contract was made, Texas Gas was also buying gas in the same area from The Atlantic Refining Company under a long term contract (the "Atlantic contract") which had been executed on September 1, 1943 (R. 81–94).[4] The term of the contract was for the duration of the field from which the gas was supplied, but not more than 25 years (R. 90–91). The contract fixed the rate to be paid during the first five years and provided (R. 86):

> (b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in simi-

[4] The contract had initially been between Atlantic and the Defense Plant Corporation, but Texas Gas (through its subsequently-merged subsidiary) had acquired all the latter's rights on May 11, 1949 (R. 81, 105, 118).

lar quantities in the southwestern part of Louisiana.

(c) During succeeding five-year periods, prices to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.

(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII.[5]

Both the 1948 and the 1953 price redeterminations under that provision were agreed upon without resort to arbitration, the price fixed for the period beginning September 1, 1953, being 12.5 cents per Mcf.[6]

Shell contended that by agreeing to the 1953 price redetermination under the Atlantic contract Texas Gas had, after 1951, "enter[ed] into a contract providing for the purchase by it of gas" within the meaning of the Shell contract. Accordingly, it claimed to be entitled to an increase of its rates to the same level under the "favored-nation" clause of its contract.

---

[5] Condition XII (R. 91–92) was a typical arbitration provision calling for the appointment by each party of one arbitrator and the selection of a third by the two so appointed or, if they failed to agree, by a designated judge. If either party failed to appoint an arbitrator, the other party's appointee was to be sole arbitrator. The decision of the arbitrators was to be "final and conclusive."

[6] R. 46, 96–97, 99–103, 119, 130–131, 132. The second price redetermination was not actually agreed upon until February 17, 1954, but, since it became effective in 1953, will be referred to as the 1953 redetermination. The 12.5 cents figure included .3 cent severance tax (R. 130).

3. Noting that the provision for arbitration made the price-redetermination provisions of the Atlantic contract definite and enforceable, the Commission, reversing its examiner (R. 112–126, 129), held that the 1953 redetermination agreement was but action which Texas Gas was obligated to take under its pre-existing contract with Atlantic and was not the entering of a new contract for the purchase of gas within the meaning of the Shell "favored-nation" clause (R. 129, 130–134).[7] In support of that interpretation of the Shell contract, the Commission, in its order denying rehearing, noted the numerous examples in the record of other contracts—to which Shell itself was a party—containing "favored-nation" clauses which, in contrast to the clause used here, were not limited in operation to higher prices paid under new contracts but were by their express terms equally applicable to price increases given under pre-existing contracts (R. 147).

4. The court of appeals vacated the Commission's order and remanded the case to the Commission, holding that the 1953 Atlantic price redetermination constituted the entering into of a contract for the purchase of gas under the Shell "favored-nation" clause (R. 160–165).[8] Although assuming for pur-

[7] As an alternative ground, the Commission also held that the price which Shell was actually receiving on June 7, 1954, was its effective rate as of that date (R. 129). That ground was abandoned in the court below in light of the court's intervening contrary decision in *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 253 F. 2d 3 (C.A. 3), certiorari denied, 357 U.S. 927.

[8] The remand was to determine the precise amount, if any, by which the Atlantic redetermined price exceeded the Shell rate,

poses of decision that the Atlantic contract was enforceable and thus a "binding agreement-to-agree on the price for gas in each of the contract's last four five year periods" (R. 164–165), the court held (R. 164):

> * * * the fact cannot be avoided that, at least for purposes of the favored nation clause, the "entering of a contract for the purchase of gas" has not been accomplished until the price has been established. True, Atlantic was obligated to deliver gas for twenty years from 1943 but, just as important, Louisiana was bound to pay for it. And while there may have been enforceable means for settling the rate of payment in the event the parties could not agree, it would nonetheless be true that it was when the price was finally established, by whatever means, that a contract had thereupon been entered. Actually, if the Louisiana-Atlantic agreement of February 17, 1954, was not an entering of a contract we are at a loss as to how it would be properly and legally characterized. The situation fits best into the rubric of an accord itself taken as satisfaction. See 6 Williston on Contracts, §§ 1841, 1846 (rev. ed. 1938). Both parties gave up their rights under the original contract to proceed to arbitration, promising on the one side to pay and on the other side to accept the price reached.

The court further stated (R. 163) that the "usual objective" of a "favored-nation" clause "is to assure the seller a top price for its gas"; and that facts surrounding the negotiation of the Shell contract "tend

---

taking into account the comparability of the terms and conditions of the sales (R. 165).

strongly to demonstrate that the intention of the parties was for any higher price paid by Louisiana to another producer to trigger a rise on the Shell contract to the same figure except possibly where a pre-existing contract already provided for a settled step-up in price."

SUMMARY OF ARGUMENT

The "favored-nation" clause in a 1951 contract for the sale of natural gas by Shell, an independent producer, to Texas Gas, a pipeline—which contract Shell filed with the Federal Power Commission as its rate schedule—provides for an increase in the price thereunder if the buyer should thereafter "enter into a contract providing for the purchase by it of gas" at a higher price. The substantive issue is whether this clause was triggered in 1953, when Texas Gas agreed to a higher price under a pre-existing long-term contract with another producer (the "Atlantic contract") which required the price thereunder to be redetermined every five years, the price to be fixed by arbitration should the parties fail to agree. The Commission held that it was not; it ruled that the "favored-nation" clause was triggered only if Texas Gas thereafter entered into a new contract for the purchase of gas, and that the 1953 Atlantic price redetermination "does not constitute [such] a new contract * * * but merely represents action taken under a pre-existing contract between Texas Gas and Atlantic" (R. 130; see R. 132). The court of appeals, interpreting the "favored-nation" clause *de novo* in the light of its own views as to the "usual objective" of such clauses, the reasons for including the clause in the Shell agreement, and the

"business practicalities" of the agreement (R. 163–164), set aside the Commission's interpretation.

I

Judicial review of the Commission's interpretation of a natural gas supply contract filed as a rate schedule is limited to a determination whether it is reasonably supported.

A. As a result of the Commission's extensive regulatory experience in the natural gas industry, it has acquired an insight into the industry's economics and business practices which is not shared by courts nor within their conventional experience. Consequently, the Commission is far better equipped than the courts to interpret natural gas purchase contracts which, in the case of independent producers such as Shell, constitute the rate schedules required to be filed with the Commission. In these circumstances, the Commission's interpretation of the rate schedule should be accepted by the reviewing court as long as it has "'warrant in the record' and a 'reasonable basis in law'" (*Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, 153–154). Such limited judicial review not only places primary responsibility for decision in the expert body which "by specialization, by insight gained through experience, and by more flexible procedure" (*Far East Conference* v. *United States*, 342 U.S. 570, 575) is best qualified to decide these questions, but also achieves a uniformity of interpretation that is necessary for the effective functioning of the regulatory process.

B. Pertinent decisions of this Court support the limited scope of judicial review of the Commission's

interpretation of the Shell "favored-nation" clause here urged. In *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division,* 358 U.S. 103, 114, the Commission's construction of a natural gas purchase contract was described as involving "matters peculiarly within the area of the Commission's special competence," and was sustained since it was "amply supported both factually and legally." See also, *United States* v. *Western Pacific R. Co.,* 352 U.S. 59, 66–67, where the Court held that certain questions of tariff interpretation lay within the primary jurisdiction of the Interstate Commerce Commission because the decision thereof "involves an intimate knowledge of" the reasons why particular items received certain classifications—a knowledge which "is possessed not by the courts but by the agency * * *."

The fact, upon which respondent relies, that in other contexts questions of contract interpretation are characterized as "questions of law" for the court does not justify the reviewing court in construing the rate schedule *de novo.* For, as this Court has recognized, the distinction between "questions of fact" and "questions of law" is not the appropriate touchstone for determining the scope of judicial review of agency action. Rather, the scope of such review must depend upon a realistic analysis of whether the issue decided by the agency is so within its expertise as to make inappropriate the substitution of the reviewing court's judgment for that of the agency.

II

The Commission's conclusion that the Shell "favored-nation" clause was not triggered by the

Atlantic price redetermination was reasonable. It reflects, and rests upon, the significant distinction in the natural gas industry between "favored-nation" clauses that are triggered whenever a buyer pays a higher price and those that are triggered only when such higher price is the result of a new contract for the purchase of gas. The Shell clause clearly is of the latter kind.

A. In the negotiation of gas supply contracts, the distinction between "future contract" "favored-nation" clauses and those that are activated whenever the buyer pays a higher price for gas rests upon critical differences in the economic effect of the two kinds of clauses. Under the former clause, the pipeline retains some measure of control over increases in the cost of its existing gas supply, and over the timing of such increases. Under the latter, however, the pipeline has no control over such factors. Thus, to whatever extent a pipeline can limit the "favored-nation" clause in the contract currently being negotiated, there is a corresponding limitation upon price increases under that contract. For this reason, the scope of "favored-nation" clauses is the subject of keen bargaining between producers and pipelines.

The Commission correctly ruled that the Shell "favored-nation" clause here involved, which provides for escalation only if the buyer thereafter enters into a contract for the purchase of gas, was not triggered by a price redetermination under an existing contract. As the Commission pointed out (R. 147), other Shell sales contracts on file with the Commission used specific language when it was "intend[ed] that escala-

tions take place when prices were raised under either old or new contracts"—phrases such as "If at any time the cost" increases or "If Buyer has entered into or should hereafter enter into a contract" for the purchase of gas at a higher price (R. 106, 107, 147). In view of the obvious care with which the lengthy and detailed provisions of the Shell contract were drafted, it is reasonable to suppose that if the parties had intended the price to escalate whenever the buyer paid a higher price under an existing contract, they would have selected the language that Shell customarily employed to achieve that result. Instead, they used language that in terms provides for a price increase only if the buyer thereafter enters into a new gas supply contract. The Atlantic price redetermination did not constitute such a subsequent entering into of a new gas contract.

B. This Court has pointed out that "The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies" (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610). The necessary effect of "favored-nation" clauses is to increase the price of natural gas in the field, and hence its price to the ultimate consumer. The Commission's construction of the Shell clause, which limits its operation to situations where the buyer enters into a new supply contract, thus furthers the consumer interest which the Act is designed to protect.

III

A. Even if the Shell rate schedule were open to *de novo* judicial examination, the court of appeals erred in holding that the Shell price was escalated

by the 1953 Atlantic price redetermination. The considerations, previously noted, that show the reasonableness of the Commission's interpretation of the Shell "favored-nation" clause also support that interpretation as an independent question of law.

B. The court of appeals treated the issue as turning on the legal characterization of the Atlantic price redetermination, *i.e.*, was the latter itself a "contract * * * for the purchase * * * of gas"? But the proper inquiry is not how the Atlantic redetermination might be characterized in some other context, but whether the parties to the Shell contract intended its "favored-nation" clause to apply to price redeterminations covering gas furnished under pre-existing supply contracts. The parties to the Shell contract did not so intend.

In any event, we submit that the court of appeals erred in holding that, even as a matter of contract law, the Atlantic price redetermination itself constituted a separate "contract * * * for the purchase * * * of gas." The Atlantic contract created a long-term commitment for the purchase of gas which remained in effect whether or not the parties were able to agree upon a new price at periodic intervals; if they were unable to do so, the price was to be fixed by arbitration. The 1953 price redetermination was not a new gas purchase contract, but rather a step taken in performance of the 1943 contract in accordance with the specific provisions for periodic price adjustments. The single-page letter in which the 1953 price readjustment is set forth does not contain the numerous detailed provisions normally found in gas purchase

contracts. Moreover, it recognizes the continuing validity of the 1943 contract, since it recites that the price change is being made "in accordance with Paragraph III of said contract" (R. 46).

ARGUMENT

The substantive issue in this case is the meaning of a "favored-nation" clause in a natural gas purchase contract that was filed with the Federal Power Commission as a rate schedule. The Commission, in the exercise of its regulatory functions under the Natural Gas Act and applying its expertise in the highly specialized and technical natural gas business, construed the clause as not authorizing a higher rate in the circumstances here involved. The court of appeals, interpreting the clause *de novo* in the light of its own views of the "usual objective" of such clauses, the reasons for including the clause in the Shell contract, and the "business practicalities" of the agreement, reached the contrary conclusion.

We shall show, however, that the proper scope of judicial review of the Commission's construction of such a contract is far narrower: The court itself cannot determine *de novo* the meaning of the "favored-nation" clause, but must accept the Commission's interpretation if reasonably supported. That conclusion, we believe, follows from the basic character of the Commission's action in construing the contract—*i.e.*, the application of its expert knowledge and judgment to a highly technical field—and from settled principles governing the relationship between courts and agencies when the former are called upon to review the exercise of the latter's expert judgment. We shall fur-

Commission's construction of the on" clause here involved was a ıe, based upon the industry custom egotiating such clauses.' Finally, even if the meaning of the clause o examination by the court of aped in holding that the price redehe Atlantic contract triggered the ause of the Shell contract.

I

THE COMMISSION'S INTERPRETATION ED AS A RATE SCHEDULE IS LIMITED ›N WHETHER IT IS REASONABLY SUP-

›N'S CONSTRUCTION OF THE "FAVORED-NAD UPON THE AGENCY'S EXPERTISE IN THE ATURAL GAS BUSINESS, SUCH INTERPRETANLY LIMITED JUDICIAL REVIEW

rst enacted the Natural Gas Act l), the Federal Power Commission

rther erred by making its own findings ıntering into such a contract. See, *e.g.*, ı *Co.* v. *Federal Power Commission*, 324 *Trade Commission* v. *Algoma Lumber* f the court considered the Commission's dequately supported by the language of factors relied on by the Commission, d have been to remand the case to the r findings. See, *e.g.*, *Securities & Ex-Chenery Co.*, 332 U.S. 194, 196; *Federal ission* v. *Pottsville Broadcasting Co.*, 309 e appropriateness of here applying this the showing, *infra*, pp. 31–36, that the in accord with the business practicalities

has been charged with the regulation of companies engaged in transporting, or selling for resale, natural gas in interstate commerce. In the course of this regulation, and particularly since this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, in 1954, the Commission has been dealing daily with the needs and problems of all segments of the natural gas industry, including producers.[10] More than 10,000 basic contracts of independent producers have already been filed with the Commission.[11] As a result of this extensive regulatory experience, the Commission has acquired an insight into the economics and business practices of the industry which is not shared by the courts nor within their conventional experience. Consequently, the Commission is far better equipped than the courts to interpret and evaluate the natural gas purchase contracts which are not only essential to the business but which, in the case of independent producers, themselves constitute the rate schedules required to be filed with the Commission.[12]

---

[10] This Court has recognized the Commission's expertise in matters relating to the natural gas industry. *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, 114; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 501; cf. *Interstate Power Co.* v. *Federal Power Commission*, 236 F. 2d 372, 385 (C.A. 8), certiorari denied, 352 U.S. 967.

[11] The Commission has not as yet required the independent producers, as it has the pipeline companies, to convert their gas sales contracts to the tariff-and-service agreement method of fixing rates. See *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103. Consequently, the producers are still selling gas under separate contracts with each purchaser.

[12] The Commission's regulations under the Natural Gas Act provide that the "rate schedules" required to be filed by inde-

Accordingly, when, as here, questions as to the interpretation of such rate schedules arise in Commission proceedings, it is not only appropriate, but necessary, in order to attain "the objects of the act * * * without constant and disconcerting friction," that the Commission's interpretations should control unless plainly erroneous. Cf. *Securities & Exchange Commission* v. *Associated Gas & Electric Co.*, 99 F. 2d 795, 798 (C.A. 2). In order to affirm the Commission, therefore, the reviewing court need not find that "[the administrative] construction is the only reasonable one, or even that it is the result * * * [the court] would have reached had the question arisen in the first instance in judicial proceedings. * * * All that is needed to support the Commission's interpretation is that it has 'warrant in the record' and a 'reasonable basis in law'" (*Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, 153–154).

Sound considerations of public policy justify such a limitation upon review of the Commission's interpretation of natural gas contracts. Primary responsibility for the resolution of these issues is thereby placed upon the body which "by specialization, by insight gained through experience, and by more flexible procedure" (*Far East Conference* v. *United States*,

---

pendent producers are "the basic contract and all supplements or agreements amendatory thereof," pursuant to which the producers sell gas to the pipelines. 18 C.F.R. 154.92–154.94. Changes in such rates cannot be made unless first filed with the Commission pursuant to Section 4(d) of the Act (18 C.F.R. 154.94 (a)); a rate change resulting from the operation of a price readjustment provision in an existing contract constitutes a "change in rate schedule" which must be filed prior to becoming effective (18 C.F.R. 154.94(e)).

342 U.S. 570, 575; *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 65) has greater appreciation of the economics and usages of the natural gas industry. Since natural gas contracts typically are long, complex and technical, and reflect the industry practices that have grown up to deal with problems peculiar to the industry, the Commission's accumulated experience with the industry is of special value for the construction of these contracts.

In addition, because of the specialized nature of the industry, many contracts contain substantially identical provisions, including those relating to price. Giving the Commission primary responsibility for their interpretation will achieve the desirable aim of obtaining consistency of construction—a result that is particularly important in the producer segment of the gas industry where the contracts themselves usually constitute the rate schedules. See notes 11, 12, *supra*, p. 17. Cf. *Dobson* v. *Commissioner*, 320 U.S. 489, 499–502, where the Court stressed the need for uniformity of decision and the difficulties of otherwise achieving it as the reasons for limiting judicial review of Tax Court decisions to a determination whether they are legally and factually reasonable. The need for "the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions" is also one of the principal bases for the primary jurisdiction rule. *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 64; *Far East Conference* v. *United States*, 342 U.S. 570, 574–575; see *infra*, pp. 23–26. On the other hand, the effect of permitting *de novo*

review by the various courts of appeals of the Commission's construction of such contracts would be to sacrifice the "[u]niformity and consistency in the regulation of business entrusted to a particular agency" that the "limited functions of review by the judiciary" (*Far East, supra*) are designed to accomplish.

In urging that judicial review of the Commission's construction of Shell's "favored-nation" clause be thus limited, we emphasize that the Commission was not here merely construing a contract that happened to come before it as an incident to a pending proceeding. For the Shell contract itself constituted the rate schedule, and the interpretation of such contracts is therefore an integral part of the Commission's rate regulatory jurisdiction.

B. SETTLED PRINCIPLES GOVERNING THE RELATIONSHIP BETWEEN COURTS AND AGENCIES JUSTIFY RESTRICTED REVIEW OF THE COMMISSION'S INTERPRETATION OF THE SHELL "FAVORED-NATION" CLAUSE

We submit that this Court's recent decision in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, fully supports the restricted scope of judicial review of the Commission's interpretation of the Shell "favored-nation" clause here urged. The question in that case was whether the Commission had properly accepted, for filing under Section 4(d) of the Natural Gas Act, certain changes in rates for gas sold under contracts between a pipeline company and its customers. The Commission construed the contracts as obligating the customers to pay the pipeline company's "going"

rate, as established from time to time in accordance with the procedures under the Act; it further held that the Act permitted such unilateral rate changes when authorized by the contract. The court of appeals reversed, holding only that the Act did not permit such unilateral rate filings even if authorized by contract between the parties. It therefore did not reach the contract interpretation question. 250 F. 2d 402.

Since this Court disagreed with the lower court's interpretation of the Act, a ruling on the issue of contract interpretation was necessary in order completely to dispose of the controversy. This Court held that a remand to the court of appeals for consideration of that question was unnecessary, since the question involved "matters peculiarly within the area of the Commission's special competence and as to which we could hardly be aided by a further examination of the record by the Court of Appeals" (358 U.S. at 114). Limiting its discussion to only a brief mention of some of the factors supporting the Commission's interpretation, the Court ruled (*ibid.*):

> After scrutinizing the record we are satisfied that the Commission's determination as to the meaning of the service agreements here involved was amply supported both factually and legally. There is no necessity for us to embark upon a detailed discussion of the various contentions made by the parties, none of which appears to have been overlooked or misapprehended by the Commission. * * *

The question of contract interpretation in the instant case—whether the price redetermination under

the pre-existing Atlantic contract constituted the "enter[ing] into [of] a contract providing for the purchase by [the buyer] of gas" at a higher price within the meaning of the Shell "favored-nation" clause—is no less a matter "peculiarly within the area of the Commission's special competence" than the question of contract interpretation in *Memphis*. In both cases, judicial review is at an end once it appears that "the Commission's determination as to the meaning of the service agreements here involved was amply supported both factually and legally." As we show *infra* (pp. 29–39), that is the case here.

The *Memphis* case promulgated no novel doctrine. It merely applied to the Commission's construction of a contract of a natural gas company subject to Commission regulation the settled principle that an agency's interpretation of its statute, rules or regulations, resting as it does upon its expertise, will not be disturbed by the reviewing court as long as it has "'warrant in the record' and a reasonable basis in law." *National Labor Relations Board* v. *Hearst Publications,* 322 U.S. 111, 131; see *Mississippi Valley Barge Line Co.* v. *United States,* 292 U.S. 282, 286–287; *Shields* v. *Utah Idaho R. Co.,* 305 U.S. 177; *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125; *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U.S. 251; *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381; *Gray* v. *Powell,* 314 U.S. 402; *Dobson* v. *Commissioner,* 320 U.S. 489; *Unemployment Compensation Commission* v. *Aragon,* 329 U.S. 143; *O'Leary* v. *Brown-Pacific-Maxon,* 340 U.S. 504; *United States* v.

Interstate Commerce Commission, 198 F. 2d 958 (C.A.D.C.), certiorari denied, 344 U.S. 893.

Thus, in the *Hearst* case, in sustaining the holding of the National Labor Relations Board that newsboys were "employees" within the meaning of the National Labor Relations Act (the court of appeals having reversed that ruling), this Court stated (p. 130):

> It is not necessary in this case to make a completely definitive limitation around the term "employee." That task has been assigned primarily to the agency created by Congress to administer the Act. Determination of "where all the conditions of the relation require protection" involves inquiries for the Board charged with this duty. Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act.

Similarly, in the instant case the determination of whether the Shell "favored-nation" clause was triggered by a price redetermination under an existing contract requires a "familiarity with the circumstances and backgrounds" of natural gas purchase agreements that the Federal Power Commission—but not the courts—possesses.

The expertise of administrative agencies likewise has been a critical factor in delineating the applica-

tion of the doctrine of primary jurisdiction. *Far East Conference* v. *United States,* 342 U.S. 570; *United States* v. *Western Pacific R. Co.,* 352 U.S. 59; *General American Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U.S. 422; *Thompson* v. *Texas Mexican R. Co.,* 328 U.S. 134.

In the *Western Pacific* case, *supra,* the question was whether the railroads had properly applied tariffs covering incendiary bombs to Government shipments of steel aerial bomb cases filled with an inflammatory material. The Court of Claims, although recognizing that questions as to the reasonableness of the application of tariff provisions to particular shipments were to be referred to the Interstate Commerce Commission, itself decided the question of tariff interpretation, *i.e.,* held that the bomb cases were "incendiary bombs" under the tariff. Although neither party challenged the latter ruling, this Court *sua sponte* held that the Court of Claims had erred in not referring that question to the Commission. Rejecting the view that questions of tariff construction are always "questions of law" for the court, this Court held (p. 65) that "whether * * * the Interstate Commerce Commission should first pass on the construction of the tariff in dispute here * * * depends on whether the question raises issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by the Act." It stated (pp. 66–67) that

> * * * [T]here were obviously commercial *reasons* why a higher tariff was set for incendiary bombs than for, say, lumber. It therefore fol-

> lows that the decision whether a certain item was intended to be covered by the tariff for incendiary bombs involves an intimate knowledge of these very reasons themselves. * * * Such familiarity is possessed not by the courts but by the agency which had the exclusive power to pass on the rate in the first instance. And, on the other hand, to decide the question of the scope of this tariff without consideration of the factors and purposes underlying the terminology employed would make the process of adjudication little more than an exercise in semantics. [Italics in original.]

Thus, this Court recognized that questions of tariff interpretation, although frequently characterized as "questions of law," may call for the same kind of expert knowledge and judgment as other issues that have traditionally been treated as within an agency's primary jurisdiction. In *Western Pacific,* resort to the agency was necessary because interpretation of the tariff provisions for incendiary bombs called for the Commission's "intimate knowledge of" the "commercial *reasons* why a higher tariff was set for incendiary bombs." In the instant case, proper interpretation of the Shell "favored-nation" clause—which is part of a contract filed as a rate schedule with the Commission, and therefore analogous to the tariffs involved in *Western Pacific*—likewise calls for application of the agency's expert knowledge of the significance of the various forms of such clauses used by the natural gas industry (see *infra,* pp. 31–39). Cf. also the *Memphis* case, *supra.*

In short, provisions in such natural gas supply con-

tracts, like "provisions in railroad collective bargaining agreements are of a specialized nature calling for specialized technical knowledge in ascertaining their meaning and application" (*Pennsylvania R. Co.* v. *Day*, 360 U.S. 548, 553). The Commission, and normally not the reviewing court, has the "specialized technical knowledge" that must be brought to bear in interpreting these complex agreements. The considerations that call for the referral of these specialized and technical issues to the agency in the first instance also require, we submit, that reviewing courts accept the agency's expert judgment if it has "'warrant in the record' and a reasonable basis in law" (*National Labor Relations Board* v. *Hearst Publications, supra*, 322 U.S. 111, 131).

Respondent argues (Br. in Opp. 18–24), however, that questions of contract interpretation present only questions of law; and that the reviewing court is as well qualified as the Commission to decide them. But, as we have shown (*supra*, pp. 16–25), the question whether Shell's "favored-nation" clause was triggered by the price redetermination under the Atlantic contract involves far "more than simply a question of reading the [contract] language or applying abstract 'rules' of construction" (*Western Pacific, supra*, p. 67). Rather, it requires the kind of expertise that "is possessed not by the courts but by the agency * * *" (*ibid.*).

This Court has pointed out (*Dobson* v. *Commissioner*, 320 U.S. 489, 501) "the want of a certain standard for distinguishing 'questions of law' from 'questions of fact,'" and has recognized the dangers

of attempting to define the scope of judicial review of administrative action on the basis of so tenuous a distinction. Thus, in *O'Leary* v. *Brown-Pacific-Maxon,* 340 U.S. 504, the Court reviewed a determination by a Deputy Commissioner under the Longshoremen and Harbor Workers Act that a deceased employee's death "arose out of and in the course of his employment." In affirming the Deputy Commissioner's award, the Court stated (340 U.S. at 507–508):

> The Deputy Commissioner treated the question whether the particular rescue attempt described by the evidence was one of the class covered by the Act as a question of "fact." Doing so only serves to illustrate once more the variety of ascertainments covered by the blanket term "fact." Here of course it does not connote a simple, external, physical event as to which there is conflicting testimony. The conclusion concerns a combination of happenings and the inferences drawn from them. In part at least, the inferences presuppose applicable standards for assessing the simple, external facts. Yet the standards are not so severable from the experience of industry nor of such a nature as to be peculiarly appropriate for independent judicial ascertainment as "questions of law."

The scope of judicial review of agency action does not turn, we submit, upon technical distinctions between "questions of fact" and "questions of law" and it is therefore immaterial that, in other contexts and for other purposes, questions of contract interpreta-

tion are characterized as questions of law. For the scope of review depends upon a realistic analysis of whether the issue decided by the agency is so within its expert competence as to make it inappropriate for the reviewing court to substitute its judgment for that of the agency. Cf. *Western Pacific, supra.*[13] Indeed, even such "questions of law" as issues of statutory interpretation have sometimes been left to agency determination with but limited review by the courts.[14] Such a restricted scope of judicial review of matters which agencies are better qualified to resolve than courts best effectuates the basic tenet of administrative law that

> * * * [I]n construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are

---

[13] See Landis, *The Administrative Process* (1951), p. 152; Brown, *Law and Fact in Judicial Review* (1943), 56 Harv. L. Rev. 899, 921–928; Cooper, *Administrative Justice and The Role of Discretion* (1938), 47 Yale L. Journal 577, 588–590; Paul, *Dobson* v. *Commissioner: The Strange Ways of Law and Fact* (1944), 57 Harv. L. Rev. 753, 803, *et seq.*; Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis* (1944), 58 Harv. L. Rev. 70, 99–109; Report of The Attorney General's Committee on Administrative Procedure (1941), pp. 88–90.

[14] See, *e.g.*, *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111 ("employees"); *Shields* v. *Utah Idaho R. Co.*, 305 U.S. 177 ("interurban railway"); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 ("bit..minous" coal); *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125 ("control" of a company); *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251 ("member of the crew"); *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143 ("labor dispute in active progress"). See Jaffe, *Judicial Review: Question of Law* (1955), 69 Harv. L. Rev. 239.

> not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Courts and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. [*United States* v. *Morgan*, 307 U.S. 183, 191.]

II

THE COMMISSION'S CONSTRUCTION OF THE SHELL "FAVORED-NATION" CLAUSE AS NOT APPLICABLE TO PRICE REDETERMINATIONS UNDER PRE-EXISTING CONTRACTS WAS REASONABLE

The Shell "favored-nation" clause provides that if at any time after December 31, 1951, Texas Gas "shall enter into a contract providing for the purchase by it of gas" at a higher price,[15] the price under the Shell contract shall be increased to the "price payable under such other contract" (R. 66-67). When the Shell contract was executed on May 1, 1951, Texas Gas was also a purchaser under a long-term contract with The Atlantic Refining Company ("Atlantic"). The Atlantic contract, executed in 1943, provided in Paragraph III for periodic price redeterminations every five

[15] The clause applies only to contracts for the purchase of gas to be produced and delivered from fields within a 50-mile radius of any gas delivered under the Shell contract (R. 67). It was stipulated that the delivery point under the Atlantic contract is within that radius (R. 15, 120).

953, the price paid by Texas Gas
eased, as reflected in a letter be-
d Atlantic which stated that the
"In accordance with Paragraph
(R. 46).

construing the Shell "favored-na-
licable only where Texas Gas en-
contract for the purchase of gas,
. 132) that the 1953 "agreement
ot constitute a new contract as re-
calation clause, but merely repre-
under a pre-existing contract be-
nd Atlantic." And, in its order
he Commission, referring to other
tracts in the record, pointed out
re Shell and its buyer did intend
e place when prices were raised
new contracts, language was used
e this result * * *."

show, this interpretation by the
Shell "favored-nation" clause was
nable, for it reflects the signifi-
the natural gas industry between
auses that are triggered whenever
igher price and those that are trig-
ich higher price is the result of a
contract. Moreover, it furthers
licy of the Natural Gas Act to pro-
consumers of natural gas against

A. THE SHELL "FAVORED-NATION" CLAUSE WAS NOT INTENDED TO COVER PRICE REDETERMINATIONS UNDER PRE-EXISTING CONTRACTS

1. *There is a basic difference in economic effect between natural gas "favored-nation" clauses that are triggered by the payment of any higher price, and those triggered only when the buyer enters into a new contract.* In construing the Shell "favored-nation" clause, the court of appeals stated (R. 163) that the "usual objective of such a clause is to assure the seller a top price for its gas." This general statement, however, overlooks the fact that, because of the particular business problems of the natural gas industry, several variations in these clauses have developed in that business. The Commission, with its specialized knowledge of the industry, was particularly well qualified to appreciate the significance of these variations.

Basic to the problem of negotiating gas supply contract between producers and pipelines is the fact that the Commission, in order to protect the public dependent upon the gas being supplied, will not authorize a pipeline to undertake new service without assurance of an adequate long-term supply of gas; and that without such gas supply lending institutions will not provide the large amounts of capital necessary to finance the heavy investment required for major pipeline construction. For this reason, most gas purchase contracts between producers and pipelines are long-term, typically of 20-years duration, or more.[16]

[16] The court below (R. 163) relied on testimony by a Shell witness (R. 13) that at the time Shell negotiated the Texas Gas contract, it "hadn't * * * before" given a 20-year contract. The Commission did not so find, and at that time Shell already had

From the producers' viewpoint, however, a long-term gas sales contract at a fixed price may be disadvantageous—particularly in periods of rising gas prices, such as this country has experienced since World War II.

These conflicting interests were resolved by providing for future price increases in long-term contracts. Such provisions take various forms. At an earlier period, when the demand for gas did not equal the supply, the contracts typically provided for periodic price increases at a fixed amount agreed upon in advance. Later, however, so-called "indefinite pricing" clauses came into widespread use.[17] These clauses

---

a number of 20-year contracts covering that area. Seven such contracts are part of the present record. These contracts were offered in evidence at the administrative hearings by reference to the files of the Commission, and are set forth at the following pages of the record certified by the Commission to the court of appeals, pursuant to Rule 18(7) of the Rules of that court: 438, 630, 1030, 1235, 1280, 1449, 1747. In accordance with that rule, the record was not physically transmitted to the court, but is being held by the agency, and is available upon request.

[17] These clauses include, in addition to the two-party "favored-nation" clause here involved, the third-party "favored-nation" clause, the "price redetermination" clause, and the "spiral escalator" clause. Under the third-party "favored-nation" clause, the price is increased whenever a higher price is paid to another producer by any one not a party to the contract. The "price redetermination" clause provides for an increased price at periodic intervals based generally upon the average of the two or three highest prices being paid for gas in a defined area. Under the "spiral escalator" clause, the price is increased in a prescribed proportion to any increase in the resale price charged by the

do not specify the amount of future increases, but make them depend upon various factors, such as the general price level in the market area, the extent to which other producers raise their prices, etc. One of the most widely-used of such provisions is the "favored-nation" clause, under which the price increase is tied to the payment of higher prices by the buyer to other sellers.

As a result of the bargaining process between the selling producer and the purchasing pipeline company, "favored-nation" clauses in use today in the natural gas industry typically vary in scope. One common variation from the basic clause, under which the price is triggered automatically whenever the buyer pays a higher price for gas in the defined area,[18] is a provision limiting the triggering to situations where (as in the instant case) the buyer pays a higher price for gas under a subsequently entered-into contract. The language utilized in providing for these different kinds of price escalations is significantly different (see *infra,* pp. 36–37), and the two types reflect a basic difference in economic and business purpose.

Pipeline negotiations for new gas are necessarily conducted in the context of existing supply arrangements and with the knowledge that the pipeline will be seeking further new gas supplies in the future. A pipeline's existing contracts typically contain one

---

purchasing pipeline. See H. Rep. No. 992, 84th Cong., 1st Sess., pp. 8–9.

[18] The scope of the geographical area in which a "favored-nation" clause is applicable varies from contract to contract depending on the parties' agreement.

or more definite or indefinite escalation clauses, and the pipeline is aware that it must accept some kind of escalation clause in order to obtain any long-term commitment. From the pipeline's point of view, a "favored-nation" clause that is triggered only when the buyer enters into a new gas-purchase contract is highly desirable because it gives the pipeline some measure of control over increases in the cost of its existing gas supply. That is, under such a clause the pipeline itself makes the business judgment that increases its gas price under existing contracts, *i.e.*, by entering into new supply contracts in the area.

Since the costs of constructing new transmission facilities are substantial, a pipeline tends to purchase new gas requirements in its existing supply areas, from which it already has adequate transmission service. Under the "new-contract" type of "favored-nation" clause, a pipeline considering expansion can balance the costs of buying new gas in its present supply areas (and thereby triggering the price increase in its existing contracts) against the costs of obtaining the new gas in other areas.

Moreover, such "new-contract" clauses enable the pipeline to determine the timing of escalated price-increases. Price escalations under an existing contract typically are fixed by the terms of that contract; for example, the Atlantic contract provided for price redetermination every five years. And since existing contracts have been entered into at various times in the past, the occurrence of price increases under such clauses are widely spread in time. In contrast, when the "favored-nation" clauses are limited to future

contracts, the pipeline under certain conditions may control price escalations by selecting the precise date on which it enters into a new contract at a higher price.

Such control over timing is valuable to a pipeline because, as a natural gas company subject to regulation under the Natural Gas Act, it can pass on its increased costs only after filing a proposed increased rate with the Commission, and Commission review thereof. It is thus impracticable for a pipeline to increase its rates with every increase in its costs. By controlling the timing of cost increases, and thus limiting their frequency, a pipeline may be able to minimize the number of rate increases that it has to file with the Commission.

On the other hand, a "favored-nation" clause that becomes operative whenever the buyer pays a higher price for gas in the same area (for whatever reason) leaves the pipeline with no control over either the occurrence or the timing of price increases in its existing supply. Thus, to whatever extent a pipeline can limit the "favored-nation" clause in the contract currently being negotiated, it maintains some control of future price increases under that contract.

From the seller's standpoint, the distinction between "new contract" "favored-nation" clauses and those operative whenever the buyer pays a higher price under existing contracts similarly rests on sound business considerations. At the time of contracting, the seller can bargain directly for substantive concessions in its own contract similar to those in the buyer's existing contracts with other producers. Its

claims for parity as against existing contracts can thus be directly negotiated and compromised, so that only the function of assuring equality with future contracts, the terms of which cannot then be known, need be left to the "favored-nation" clause. Thus, restricting the operation of "favored-nation" clauses of the type here involved to situations where the buyer enters into a new contract for the purchase of gas is in no way unfair to the seller. He has good bargaining position, and he gets precisely what he bargained for.

2. *The Commission correctly construed the Shell "favored-nation" clause here involved as triggered only by the execution of a new contract for the purchase of gas.* In view of the Commission's knowledge of the foregoing practical economic considerations bearing upon the negotiation of natural gas supply contracts,[19] we submit that the Commission was fully justified in holding that the Shell "favored-nation" clause was triggered only when Texas Gas entered into a new contract for the purchase of gas, and not upon a mere price redetermination under an existing contract. For, as the Commission pointed out (R. 147) in denying rehearing, other gas sales contracts that Shell had also filed with the Commission as rate schedules used specific language when it was "intend[ed] that escalations take place when prices were raised under either old or new contracts * * *"—language which unequivocally states that the price is to be increased at any time that the buyer pays a

[19] It is these factors, rather than those conjectured by the court below (R. 163–164), that constitute the "business practicalities" (R. 164) in the light of which the Shell contract must be construed.

higher price for gas. For example, the "favored-nation" clause in Shell's contract with Tennessee Gas Transmission Company (Shell Gas Rate Schedule No. 6), executed on February 23, 1951, about two months prior to the contract here involved, provides (R. 106; emphasis added):

> If *at any time the cost per MCF of gas purchased by Buyer from any gas producer whomsoever* * * * *shall be greater* than the cost per MCF of gas purchased hereunder, Buyer will increase the price per MCF payable to Seller for gas delivered hereunder * * *.

The broad phrase "at any time" appears again in the comparable provision of Shell's Gas Rate Schedule No. 4, which likewise provides (R. 147; emphasis added):

> If *at any time or times the price per MCF of gas or dry gas purchased by [the Buyer] from any gas producer whomever* * * * *shall be greater* than the price per MCF of gas purchased hereunder, [the Buyer] will increase the price per MCF payable to [Shell] for gas delivered hereunder * * *

Shell's Rate Schedule No. 10 (R. 107) explicitly provides for a price increase where the buyer pays a higher price under either an existing or future contract. It states:

> If Buyer has entered into or should hereafter enter into a contract at any time or from time to time for the purchase of gas * * * and such contract provides a price to be paid for such gas during any year, which differs from the price payable under this contract during the same year * * *.

Gas purchase contracts involve substantial sums, they are complex and technical documents, and they are usually the subject of protracted negotiations between the parties. The Shell contract in the instant case is a lengthy document (R. 57–71), obviously prepared with careful attention to many details. If the parties had intended the "favored-nation" clause in this contract to have been operative whenever the buyer merely paid a higher price under an existing contract, it is reasonable to suppose that they would have used language similar to that employed in other Shell contracts that clearly so provides—phrases such as "If at any time the cost" increases, or "If Buyer has entered into or should hereafter enter into a contract" for the purchase of gas at a higher price.

Instead, however, the parties chose to employ terminology that points in precisely the opposite direction: "If at any time after December 31, 1951, Buyer shall enter into a contract providing for the purchase by it of gas" at a higher price, the price payable under the Shell contract shall "equal the price payable under such other contract" (R. 66–67). In the light of the significant differences between the economic consequences of the two types of clauses, and the sharp difference in language between the instant clause and other clauses of Shell contracts on file with the Commission, we submit that the Commission was plainly reasonable in construing the instant contract as meaning what it obviously intended: namely, that the price increase would be triggered only if Texas Gas there-

after entered into a new contract for the purchase of gas.

3. ***The price redetermination under the Atlantic contract did not constitute the "enter[ing] into" of a new gas-purchase contract within the meaning of the Shell "favored-nation" clause.*** The Commission correctly ruled that the price redetermination under the Atlantic contract did not constitute the "enter[ing] into" of a new contract within the meaning of the Shell "favored-nation" clause. For, as the Commission pointed out (R. 132; see R. 130), the "letter agreement" between Texas Gas and Atlantic that redetermined the price (R. 46) was not "a new contract for the purchase of gas," but was merely "action taken pursuant to the pre-existing 1943 Atlantic contract."

In view of the business considerations previously discussed that underlie the negotiation of "favored-nation" clauses in the natural gas industry (*supra,* pp. 31–36), we submit that the parties to the Shell contract did not intend that a price redetermination under a pre-existing gas contract of Texas Gas would escalate prices under the Shell contract. Such a price increase was not a matter over which Texas Gas had control. The price under the Atlantic contract was subject to renegotiation every five years, and if the parties were unable to agree upon a new higher price, the contract provided for its fixing through compulsory arbitration. The question is discussed at greater length in Point III, *infra,* pp. 42–50, where we point out the errors of the contrary ruling by the court of appeals.

B. THE COMMISSION'S INTERPRETATION OF THE SHELL "FAVORED-NATION" CLAUSE FURTHERS THE PURPOSE OF THE NATURAL GAS ACT TO PROTECT THE ULTIMATE CONSUMERS

As this Court has pointed out, "The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies." *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610; see *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577, 581; *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 685. The necessary effect of "favored-nation" clauses is to increase the price of natural gas in the field, and hence its price to the ultimate consumers (see *infra*, pp. 40–41). The Commission's construction of the Shell clause, which limits its operation to situations where the buyer enters into a new supply contract, thus furthers the policy of the Act by minimizing the clause's inflationary impact. On the other hand, the court of appeals' construction, which results in higher prices whenever the buyer merely pays a higher price under an existing contract providing for price redeterminations, inevitably and unnecessarily increases prices to the ultimate consumers.

Typically, the event which triggers a "favored-nation" clause is the payment by the pipeline of a higher price. But since the reasons for this higher price relate solely to the situation of the new seller, price increases under such clauses are unrelated to the costs, financial needs, or other economic factors of the producer whose rates are thereby escalated. The deleterious effect of these clauses upon the consumer interest is furthered by the fact that under

them the current producer price is escalated not to the average price in the field nor even to the generally prevailing price, but to the highest price being paid by the pipeline. As a result, "favored-nation" clauses not only exert a strong upward pressure upon producer prices, but also tend to increase the prevailing market price in the area.

Since the purpose and effect of these clauses is always to raise the producer price, never to reduce it, these clauses never operate in the interest of the consumers.[20] Accordingly, any proper restriction upon

[20] The serious effect of "favored-nation" clauses upon natural gas consumers was recognized by both the proponents and the opponents of the legislation passed in the 84th Congress to exempt producers from regulation under the Natural Gas Act. See Hearings before the House Interstate and Foreign Commerce Committee on H.R. 4560, 84th Cong., 1st Sess., pp. 82–87, 1543; Hearings before the Senate Interstate and Foreign Commerce Committee on S. 712, *et al.*, 84th Cong., 1st Sess., pp. 134–137, 1593–1619. The bill that Congress enacted (which the President vetoed for other reasons (see H. Doc. No. 342, 84th Cong., 1st Sess.; 102 Cong. Rec. 2897–2898)) contained various prohibitions and restrictions upon the use of "favored-nation" clauses. H.R. 6645, 84th Cong., 1st Sess. In proposing such limitations, the House Committee stated (H. Rep. No. 992, 84th Cong., 1st Sess., p. 9):

> Many witnesses appearing before the Committee, particularly those representing distributing interests and consumer areas, maintained that escalation clauses in existing contracts, unless their operation is controlled in some effective manner, could result in very large increases in the cost of gas to consumers—particularly in view of the fact that a contract for natural gas usually runs for 20 years or more, and a large proportion of the contracts presently in effect were entered into in recent years.

The Senate bill (S. 1853) contained similar provisions "designed to give the consumer further protection against unwarranted price increases due to escalation clauses." S. Rep. No. 1219, 84th Cong., 1st Sess., p. 9; see also pp. 7–9, 11–12, 22.

the scope of such clauses necessarily favors the consumer interest which the Act is designed to protect.

III

EVEN IF THE QUESTION WHETHER THE ATLANTIC PRICE REDETERMINATION TRIGGERED THE SHELL "FAVORED-NATION" CLAUSE WERE OPEN TO DE NOVO JUDICIAL EXAMINATION, THE COURT OF APPEALS' RULING IS ERRONEOUS

In Points I and II. *supra,* we have shown that, upon judicial review of the Commission's interpretation of the Shell "favored-nation" clause contained in a rate schedule filed with the agency, the court of appeals is limited to determining whether the Commission's construction is reasonable; and that the Commission's ruling that the Atlantic price redetermination did not trigger the Shell price rise, based as it was upon the agency's expert knowledge of the natural gas business, satisfies that standard. We shall now show that, even if the matter were deemed subject to *de novo* judicial examination, the court of appeals nevertheless erred in holding that the Shell price was escalated when the Atlantic price was increased.

A. THE SHELL "FAVORED-NATION" CLAUSE APPLIES ONLY WHEN THE BUYER ENTERS INTO A NEW GAS-SUPPLY CONTRACT, AND NOT WHEN THE PRICE UNDER A PRE-EXISTING CONTRACT IS REDETERMINED

The arguments presented in Point II, *supra,* to support the reasonableness of the Commission's holding that the Shell "favored-nation" clause is triggered only by the execution of a new gas-purchase contract

also establish the correctness of that ruling as an independent question of law. The clear distinction between the other Shell clauses that, in terms, apply whenever the buyer pays a higher price under existing or future contracts (*supra,* pp. 36–37) and the instant clause, which is activated only if, at some future date, the "Buyer shall enter into a contract" for the purchase of gas at a higher price (R. 66–67), shows that the two types of clauses are not the same. We submit that the parties' use of the latter, rather than the former, type of clause in the instant agreement was not inadvertent. On the contrary, it clearly manifested their intent that Texas Gas was not to pay a higher price under the Shell contract merely because it thereafter paid a higher price for gas, but only when such higher price was the result of its thereafter "enter[ing] into" a new contract for the purchase of gas.

As noted (*supra,* pp. 31–36), such a limitation reflects the basic economics of the natural gas business. The statement of the court below (R. 163) that the parties intended that "any higher price paid by [the buyer] to another producer [was] to trigger a rise on the Shell contract to the same figure except possibly where a pre-existing contract already provided for a settled step-up in price" ignores the clear distinction between the two types of "favored-nation" clauses shown by the record.[21]

[21] Moreover, there is no basis either in the provisions of the Shell contract, or in the record, for the court's exception in cases "where a pre-existing contract already provided for a settled step-up in price."

IC PRICE REDETERMINATION WAS NOT THE ENTERING
EW CONTRACT FOR THE PURCHASE OF GAS WITHIN
G OF THE SHELL "FAVORED-NATION" CLAUSE

ling that the Atlantic price redetermina-
ed the Shell price, the court of appeals
question as turning on the legal characteri-
e former, *i.e.*, was the Atlantic price rede-
itself a "contract for the purchase of
whether the Atlantic redetermination esca-
hell price is a question of the intent of
to the Shell contract, *i.e.*, what events did
would escalate the Shell price. The criti-
erefore, is not how the Atlantic redetermi-
ht be characterized as an independent
contract law in some other context, but
parties to the Shell contract, in agreeing
ire-contract" limitation, intended it to ex-
e redeterminations covering gas furnished
xisting supply arrangements. As we have
circumstances surrounding the transaction
t the parties to the Shell contract intended
ereunder to escalate only when the buyer
ntered into a new supply contract. See
1–39.

event, we submit that the court below
cluding that, as a matter of contract law,
price redetermination itself constituted a
ontract * * * for the purchase * * * of
court predicated this conclusion on the
at the Atlantic price redetermination was
agreement of the parties rather than by
that such an agreement is a "contract":

that the "purchase" of gas could not be completed until the price was established; and that, therefore, the price redetermination was a "contract providing for the purchase * * * of gas" entered into after the specified date in the Shell clause (R. 164). But examination of the 1943 Atlantic contract and the letter setting forth the 1953 redetermination shows (1) that the 1943 contract created a long-term commitment for the purchase of gas which remained in effect whether or not the parties were able to agree upon a new price at periodic intervals; and (2) that the 1953 price redetermination was not a gas purchase "contract" separate and distinct from the basic 1943 contract, but rather was a step taken in performance of the latter in accordance with its explicit provisions.

By its terms, the duration of the 1943 contract does not depend upon the successful renegotiation of the price thereunder, but upon the continued existence of the supply of gas. Condition X of the contract provides (R. 90–91):

> The rights of the parties hereunder shall continue in force and effect for the gas producing life of the North Tepetate Pool but in any event not to exceed twenty-five (25) years, unless sooner terminated by mutual consent or pursuant to the specific rights of termination herein elsewhere set forth.

Since there is no claim that the contract has been terminated by mutual consent or that the gas-producing life of the North Tepetate Pool has expired, the 1943 contract plainly was in full force and effect at

This view of the 1943 contract as a single long-term agreement with provisions for periodic price adjustment, rather than as a five-year contract periodically renewable if the parties agree upon a new price, accords with the normal industry practice of employing long-term contracts (see *supra,* pp. 31–32). It is further supported by the provisions in that contract for price redetermination which, we believe, make it explicit that the agreement continues whether or not the parties can agree upon new prices. After providing for price adjustments by agreement of the parties, the contract states (Condition III(d), R. 86):

> In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII.

Thus, the continued operation of the contract is made completely independent of the parties' ability to agree upon a new price. For if they cannot do so, the only effect is that the matter then goes to arbitration. Their respective contractual obligations to supply and to buy gas, however, continues. By agreeing upon a new price the parties did not, as the court of appeals stated (R. 164), "[give] up their rights under the original contract to proceed to arbitration." Rather, they were carrying out the contractual provisions for price adjustment by the parties, and thus making it unnecessary to invoke the alternative price-fixing device of arbitration.

The letter which sets forth the 1953 price redetermination (R. 46) further shows that the redetermination was not a new gas-purchase contract, "but merely represents action taken under a pre-existing contract" (R. 130). This single-page document contains none of the myriad of details normally found in a gas contract (compare R. 57–71, 81–94), and does not purport to be in substitution for the 1943 agreement. On the contrary, it recognizes the continuing validity of that agreement. For, after referring in general terms to the 1943 contract, it provides (R. 46; emphasis added):

> *In accordance with Paragraph III of said contract,* it is hereby agreed that the price * * * for gas sold and delivered under such contract between September 1, 1953, and August 31, 1958, [the five-year period prescribed by the 1943 contract] shall be * * *.

In *Phillips Petroleum Co.* v. *Federal Power Commission,* 227 F. 2d 470 (C.A. 10), certiorari denied, 350 U.S. 1005, the question was whether the Commission had properly suspended certain rate schedules filed by a natural gas producer. This depended upon whether two letter agreements between the producer and the pipeline, providing for increased rates "[i]n accordance with the 'formula [in the escalator clause] in the contract' " between them (227 F. 2d at p. 472), were part of the basic contract or whether they constituted a separate agreement. The court held (p. 476) that "the original contract, as amended, together with the letter agreements are all integrated parts of one contract." It pointed out (p. 475; emphasis

> was being paid not by force of letter agreements, but by force of the binding effect of the escalator clauses which operated to fix the prescribed rate in accordance with the formula in the contract. *The letter agreements were merely executory of the contracts between the parties.*

This reasoning, we submit, is equally applicable to the instant case.

Shell's actions after learning of the Atlantic price redetermination further indicate that the parties did not intend that such a price adjustment would trigger the Shell "favored-nation" clause. Although Shell learned about the Atlantic price increase in March, 1954 (R. 16), it did not notify Texas Gas that it was claiming the increased price until more than six months later, in October, 1954 (R. 35). Moreover, in its original rate filing with the Commission in November, 1954, Shell did not show the higher Atlantic rate as its effective rate on June 7, 1954. Instead, it filed the Shell contract showing the old rate, together with a "sample" billing at the higher rate (R. 80, 110, 127). When the Commission requested an explanation (R. 151), Shell waited more than two years before presenting to the Commission its justification for the higher rate (R. 72–77). From March, 1954, to February, 1957, the credit memoranda submitted by Texas Gas and its checks in payment for the gas under the Shell contract uniformly set forth, and were based upon, the unescalated price provided by that contract (8.997¢ per Mcf) (R. 48–50). In accepting those checks over this extended period, Shell never attempted to pre-

of seven statements made by Shell during this period to public accountants who were auditing the books of Texas Gas and its predecessor, Shell stated that balances due to it as shown by such books, which were calculated on the basis of the unescalated price, were correct (R. 50–57).

The court of appeals' characterization of the price redetermination as "fit[ting] best into the rubric of an accord itself taken as satisfaction" (R. 164) is unsound. An "Accord and satisfaction is the discharge of a contract, or a disputed claim arising either from a contract or from a tort, by the substitution of an agreement between the parties in satisfaction of such contract or disputed claim * * *." *Nelson* v. *Chicago Mill & Lumber Corp.*, 76 F. 2d 17, 23–24 (C.A. 8); see also, *General Foods Corp.* v. *The Felipe Camarao*, 172 F. 2d 131, 133 (C.A. 2), certiorari denied, 337 U.S. 908; *Whiting Stoker Co.* v. *Chicago Stoker Corp.*, 171 F. 2d 248, 252 (C.A. 7), certiorari denied, 337 U.S. 915; *Sinclair Refining Co.* v. *Gutowski*, 195 F. 2d 637, 640 (C.A. 6), certiorari denied, 344 U.S. 821; 6 Corbin, *Contracts* (1951 ed.) § 1276. Here, there was no discharge of the 1943 contract and the 1953 single-page letter agreement was not in substitution for the original contract. It was "merely executory of the contract between the parties" (*Phillips, supra*) which provided for periodic rate adjustments at five-year intervals, to be determined either by agreement of the parties or, if that failed, by arbitration.[22]

[22] The absence of any precise formula for redetermining the price does not, as Shell apparently suggests (Br. in Opp. 16–17), make the Atlantic contract unenforceable, and thus convert every price readjustment into a new purchase con-

The error in the court of appeals' ruling is further shown by the court's apparent recognition that, if the parties to the Atlantic contract had failed to agree in 1953 and the new price had been fixed by arbitration, no new gas-purchase contract would have resulted (see R. 164). But the parties to the Shell contract, and particularly Shell, obviously did not intend that Shell's right to a higher price would depend on the fortuity that the new Atlantic price was fixed by agreement rather than through arbitration. The correct interpretation of the Shell agreement, we submit, is that the parties used language which meant what it says, namely, that the price thereunder would be increased only if the buyer thereafter entered into a new contract for the purchase of gas. The Atlantic price redetermination, made pursuant to the specific provisions therefor in the Atlantic contract, did not constitute a new gas-purchase contract.

---

tract. The Atlantic contract provided that the redetermined prices were to be agreed upon "after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana" (R. 86). This was obviously the touchstone for determining the prices, and it was a sufficiently definite standard. See, *e.g.*, *Cities Service Gas Producing Co.* v. *Federal Power Commission*, 233 F. 2d 726, 730 (C.A. 10), certiorari denied, 352 U.S. 911; *Col-Tex Refining Co.* v. *Coffield & Guthrie, Inc.*, 196 F. 2d 788 (C.A. 5). In any event, any otherwise fatal vagueness was cured by the provision for arbitration if the parties failed to agree. *Texas Co.* v. *Z. & M. Independent Oil Co.*, 156 F. 2d 862, 866–867 (C.A. 2); *United Fuel Gas Co.* v. *Columbian Fuel Corporation*, 165 F. 2d 746 (C.A. 4); *Aitchison* v. *Anderson*, 183 F. 2d 922, 925 (C.A. 9). Moreover, the parties to the contract treated it as enforceable, and under its standards were able to reach agreement on price increases both in 1948 and 1953, without having to resort to arbitration.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed and that the Commission's order, holding that the Atlantic price redetermination did not escalate the Shell price, should be reinstated.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

DANIEL M. FRIEDMAN,
Assistant to the Solicitor General.

SAMUEL D. SLADE,
ANTHONY L. MONDELLO,
Attorneys.

WILLARD W. GATCHELL,
General Counsel,

HOWARD E. WAHRENBROCK,
Solicitor,

N. RUSSELL GORMAN,
Assistant General Counsel,
Federal Power Commission.

MARCH 1960.

APPENDIX

The Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*, provides in pertinent part as follows:

> SEC. 4(c): Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect [June 21, 1938]) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services. [15 U.S.C. 717c(c).]
>
> SEC. 4(d): Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and

the time when they shall take effect and the manner in which they shall be filed and published. [15 U.S.C. 717c(d).]

SEC. 19(b): Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced

upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347). [15 U.S.C. 717r.]

U. S. GOVERNMENT PRINTING OFFICE: 1980

LIBRARY

TABLE OF CONTENTS.

	PAGE
Opinion and Orders Below	1
Questions Presented	1
Statutes Involved	3
Statement	3
(a) Nature of the Proceeding	3
(b) Decision of the Presiding Examiner	5
(c) Order of the Commission	5
(d) Opinion of the Court of Appeals	5
(e) The Facts	6
Summary of Argument	11
Argument	21
I.—On review of the Commission's order the court below was fully empowered to decide for itself whether the Commission had correctly resolved the issue	23
A. The Commission resolved a question solely of law	23
B. The Commission did not resolve the issue on the basis of expertise, industry practice, or economic impact, nor did the issue permit such determination	28
C. Section 19 (b) of the Gas Act and §10 (e) of the Administrative Procedure Act make it clear that questions of law are fully and independently reviewable as to their correctness	35

PAGE

D. The Shell clause is not a patterned type but speaks for itself in clear ordinary language. The Commission's construction would defeat its purpose 35

E. The Atlantic contract does not contain a price redetermination clause nor did the Commission so hold 43

II.—The Court of Appeals was correct in deciding that the February 17, 1954 agreement caused the Shell price to increase as that agreement was clearly entry into a contract by the pipe line 46

A. The Decision of the Court Below 46

B. In any event the Commission's conclusion was not reasonably supported 50

III.—Petitioners' post-rationalization of the Commission's decision is not supported by the record or the Commission's order 52

The Issue of Enforceability which was not reached by the Court of Appeals 61

CONCLUSION 63

Appendix:

Appendix A.
Section 19(b) of the Natural Gas Act A-1

Appendix B.
Section 10(e) of the Administrative Procedure Act B-1

Table of Cases.

PAGE

American Colortype Co. v. *Continental Colortype Co.*, 188 U. S. 104 (1903) 17, 19, 49

Brown & Sons Lumber Co. v. *Louisville & Nashville R. Co.*, 299 U. S. 393 (1937) 12, 15, 24, 26

Davies Warehouse Co. v. *Bowles*, 321 U. S. 144 (1944) 14

Federal Communications Commission v. *RCA Communications*, 346 U. S. 86, 91 (1953) 34

F. P. C. v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944) 59

F. P. C. v. *Interstate Natural Gas Co.*, 336 U. S. 577 (1949) 59

Federal Maritime Board v. *Isbrandtsen Co.*, 356 U. S. 481 (1958) 12, 27

Great Northern R. Co. v. *Merchants Elevator Co.*, 259 U. S. 285 (1922) 12, 14, 15, 24, 26, 55

In the Matter of Shell Oil Company, Docket No. G-5035 13

Kansas Power & Light Co. v. *Hugoton Production Co.*, 10 Cir. 251 F. 2d 946 (1958) 58

Phillips Petroleum Co. v. *F. P. C.*, 10 Cir., 227 F. 2d 470 (1955); cert. den. 350 U. S. 1005 (1956) 47

Phillips Petroleum Company v. *Wisconsin*, 347 U. S. 672 (1954) 3, 25, 27, 59

Santovincenzo v. *Egan*, 284 U. S. 30 (1931) 48

SEC v. *Chenery Corp.*, 318 U. S. 80 (1943) 13, 34

Southwestern Sugar and Molasses Co. v. *River Terminals Corp.*, 360 U. S. 411, 420 (1959) 27

The Atlantic Refining Co. v. *Public Service Commission*, 360 U. S. 378 (1959) 59

United Gas Pipe Line Co. v. *Memphis Light, Gas & Water Div.*, 358 U. S. 103 (1958) 12, 49, 60

United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956) 11, 31, 59, 60

PAGE

United States v. *Chesapeake & Ohio R. Co.*, 352 U. S. 77 (1956) 13

United States v. *Western Pacific Railroad Company*, 352 U. S. 59 (1956) 13, 26

STATUTES.

Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009(e)),

Section 10(e) 3, 15, 35

Section 7(d) 34

Section 8(b) 36

Natural Gas Act (52 Stat. 821, 15 U. S. C. 717r(b)),

Section 19(b) 3, 14, 15, 35

Section 4(e) 4

OTHER AUTHORITIES.

4 Davis, *Administrative Law Treatise*, §30.09, p. 242, fn. 7 (1958) 26

Williston on Contracts (Rev. Ed.), Vol. 3, §662 34

House Committee, 84th Cong., 1st Sess. on H. R. 4560 (Harris Bill) 33

H. R. 6645, 84th Cong., 1st Sess. (House Report No. 992, 84th Cong., 1st Sess. p. 8) 34

H. R. 366, 86th Congress, 1st Session, §14(a) (3) 45

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

Nos. 167 and 170.

TEXAS GAS TRANSMISSION CORPORATION AND LOUISVILLE GAS AND ELECTRIC COMPANY AND FEDERAL POWER COMMISSION,
Petitioners,

v.

SHELL OIL COMPANY,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF SHELL OIL COMPANY.

Opinion and Orders Below.

The opinion of the Court of Appeals (R. 160-165) is reported at 263 F. 2d 223. The order of the Federal Power Commission (R. 126-137) is reported at 18 F. P. C. 617; denial of rehearing (R. 143-150) is reported at 19 F. P. C. 74. The decision of the Presiding Examiner is in the record (R. 112-126).

Questions Presented.

The price escalation clause in a 1951 gas sale contract between Shell and the pipe line becomes "immediately" operative should the pipe line thereafter "enter into a contract providing for the purchase by it of gas" at a higher

price. On February 17, 1954, when Shell was receiving 8.997 cents per Mcf for its gas, the pipe line, after extensive negotiations with another producer (Atlantic Refining Company), entered into an agreement with Atlantic agreeing upon the purchase price of 12.5 cents per Mcf for gas to be sold by Atlantic to the pipe line for the period September 1, 1953 to August 31, 1958. This 1954 agreement resulted from a prior gas purchase contract which had an established price for the first five years but which, for each five year period after the first five years, did not establish a fixed price but required (R. 86) "Buyer and Seller are to reach an agreement as to price. . . . The price . . . is to be agreed upon at the beginning of such [five year] period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana." Arbitration could be resorted to if the parties were unable to agree upon the price.

After a dispute arose between Shell and the pipe line as to whether the February 1954 agreement between the pipe line and Atlantic was a contract which activated the price clause in the Shell contract, and pursuant to the Commission's 1954 regulations requiring producers' contracts to be filed as rate schedules (18 C.F.R. 154.91, *et seq.*), Shell filed its 1951 contract with the Commission. In a proceeding convened by the Commission to determine Shell's "properly effective" June 7, 1954 price, the Presiding Examiner concluded that the February 1954 agreement activated the Shell clause. The Commission reversed the Examiner and held that the Shell clause required a "new" contract and that the 1954 agreement between the pipe line and Atlantic was not a "new" contract but was "merely action taken pursuant to a pre-existing contract". The Court of Appeals held the February 1954 agreement

was a contract within the contemplation of and hence activated the Shell clause. Accordingly, the Court vacated the Commission's order and remanded to the Commission to ascertain whether the price in the February 1954 contract was indeed higher than the Shell price.

The questions presented are:

1. Whether, in these circumstances, the Court of Appeals exceeded its power in reviewing the *correctness* of the Commission's determination.

2. Whether the Court of Appeals was correct in deciding that the February 1954 agreement constituted entry into a contract within the meaning of the Shell price clause.

Statutes Involved.

Section 19(b) of the Natural Gas Act (52 Stat. 831, 15 U. S. C. 717r(b)) and Section 10(e) of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009(e)) are printed as Appendices A and B hereto.

Statement.

(a) Nature of the Proceeding.

This proceeding was instituted by the Federal Power Commission for the purpose of determining Shell's legally effective rate as of June 7, 1954[1] for natural gas produced in the Chalkley Field, Cameron Parish, Louisiana and sold by Shell to Louisiana Natural Gas Corporation[2] under a

---

[1] The date as of which the Commission asserted jurisdiction over the prices of independent producers of natural gas following *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672 (1954).

[2] The contract was between Shell, as Seller, and Louisiana Natural, as Buyer. By merger in June, 1955, Texas Gas Transmission Corporation, a petitioner here, succeeded to all the rights and obligations of Louisiana Natural under the contract. The purchaser under this contract will be referred to generally as the pipe line, and sometimes as Louisiana Natural or Texas Gas, depending upon which was the purchaser at the time of the event being discussed.

contract dated May 1, 1951. The contract is on file with and has been accepted by the Commission as Shell's F.P.C. Gas Rate Schedule No. 153 (R. 57-71; 152-159).

Pursuant to the Commission's regulations (18 C. F. R. 154.91, *et seq.*), Shell filed with the Commission the May 1, 1951 contract. The filing was accompanied by a credit statement furnished to Shell by the purchaser[3] covering deliveries of gas for the month of May, 1954 (R. 81). This statement shows that payments as of that time were being made on the basis of 8.997¢ per Mcf. The filing was also accompanied by a sample billing showing Shell's June 7, 1954 price to be 12.5¢ per Mcf instead of 8.997¢ per Mcf (R. 80). This latter statement contains the following notation (R. 80):

> "We [Shell] claim the contract price is 12.5¢ per Mcf. (effective from September 1, 1953), but we have received only 8.997¢ per Mcf. This matter is now under negotiation with purchaser."

On February 11, 1957 Shell filed an application for a rate increase from 12.5¢ to 16.75¢ per Mcf[4] (R. 72-77). In this filing Shell explained the basis for its position that the legally effective rate on June 7, 1954 was 12.5¢ per Mcf, the basis being that under the price escalation clause in its contract, the price had automatically increased to that figure prior to June 7, 1954, by virtue of the February 17, 1954 agreement.

---

[3] The contract did not provide for Shell to bill the purchaser for gas sold. Instead the contract required, and the practice was, that the purchaser furnish Shell with monthly statements showing how much gas was received under the contract and the amount owing therefor to Shell (R. 18, 90).

[4] This increase was admittedly authorized under Shell's contract and is not at issue here. It has been suspended and its justness and reasonableness is pending before the Commission in another proceeding under §4(e) of the Gas Act.

The Commission accepted the filing of the Shell contract and simultaneously fixed the matter for hearing "for the purpose of determining and fixing the rate properly effective on June 7, 1954" (R. 110-111). Texas Gas, present purchaser under the Shell contract, and Louisville Gas & Electric Company, a customer of Texas Gas (petitioners in No. 167), were permitted to intervene and, together with Commission Staff Counsel, participated in the hearing which was held on April 29, 1957.

(b) Decision of the Presiding Examiner.

The Presiding Examiner decided that the February 1954 agreement between the pipe line and Atlantic was a contract for the purchase of gas within the meaning of and hence activated the Shell clause (R. 112-126).

(c) Order of the Commission.

On exceptions the Commission reversed the Examiner and held that Shell's effective June 7, 1954 price was 8.997¢ per Mcf (R. 126-137). Shell applied for rehearing which the Commission denied (R. 143-150).

(d) Opinion of the Court of Appeals.

The Court held that the February 17, 1954 agreement constituted entry by the pipe line into a contract which activated the Shell clause. The Court vacated the Commission's order and remanded for determination of whether the price in the February, 1954 contract was indeed higher than the Shell price. The Court did not find it necessary to pass on the issue of whether the 1943 Atlantic contract created a binding and enforceable obligation as to each of the last four five-year periods (R. 164-165), this being one of the issues extensively briefed and argued to the Court.

(e) The Facts.

The 1951 Shell-Louisiana contract contains the following provision ("Shell clause") (R. 66-67):

> **"If at any time after December 31, 1951, Buyer shall enter into a contract providing for the purchase by it of gas produced from a field or fields located, and delivered to Buyer, within a radius of fifty (50) miles of any point of delivery provided hereunder, Buyer shall forthwith notify Seller of such fact, and if the price per one thousand (1000) cubic feet at any time payable under such other contract is higher than the price payable hereunder, each price payable hereunder which is less than the price payable at the same time under such other contract shall be immediately increased so that it will equal the price payable under such other contract. In determining whether the price payable under such other contract is "higher" than the price payable for gas under this contract, due consideration shall be given to the provisions of this contract as compared with such other contract as to quality of gas, delivery pressures, gathering and compressing arrangements, quantity, provisions regarding measurement of gas, including deviation from Boyle's Law, taxes payable on or in respect of gas delivered and all other pertinent factors."**

Prior to the Shell contract, Atlantic, as seller, had entered into a "Gas Purchase Contract" with Defense Plant Corporation, as buyer, dated September 1, 1943 covering the sale of gas in the North Tepetate Field,[5] Acadia Parish, Louisiana (R. 81-96) ("1943 Atlantic contract"). In this contract, which provides that the "*rights of the parties*" are to continue for the producing life of the field but not to exceed 25 years (R. 90-91), the "*Seller agrees to sell*" and "*Buyer agrees to buy*" specified *daily* quantities of gas to be delivered in the field where the gas is produced (R. 82, 83-84).[6] The contract fixes a definite

[5] This field is within the 50-mile radius of the delivery point [illegible] (R. 15).

price for the first five years (R. 85-86), but no price is fixed subsequent to the first five years. Rather, the contract provides (R. 86):

> "(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.
>
> "(c) During succeeding five-year periods, prices to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.
>
> "(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII."[7]

---

[7] Condition XII reads (R. 91-92):

> "• • • The party desiring such arbitration shall notify the other and in such notice shall name an arbitrator, the arbitrator to be appointed by the other party shall be named within ten (10) days after receipt of such notice of arbitration, and an additional arbitrator shall, within ten (10) days of the appointment of the second arbitrator, be selected by the two (2) arbitrators theretofore appointed, but if one of said parties shall have failed to appoint an arbitrator within the time provided herein, it is expressly understood and agreed that the sole arbitrator shall arbitrate the question alone. If arbitrators shall have been appointed by the respective parties and shall have failed to select the third arbitrator within the above stated time, the third arbitrator shall be appointed by the senior Judge of the 5th Federal Judicial Circuit upon application therefor by either of said parties to the arbitration.
>
> "• • • The decision in writing signed by a majority of the arbitrators shall be final and conclusive with respect to the matter submitted and the parties hereto agree to accept and abide by the same."

War Assets Administration succeeded to the rights and obligations of Defense Plant Corporation as purchaser under the 1943 Atlantic contract, and by letter agreement between War Assets Administration and Atlantic dated October 26, 1948, those parties agreed upon a price for the six-month period from September 1, 1948 to March 1, 1949 (R. 96-97). This agreement provides that at the end of that six-month period the parties "*will negotiate*, in accordance with paragraph III b and d, the price to be paid for gas delivered during the remaining four years and six months of the second five-year period as provided in the contract" (R. 97).

Pursuant to the foregoing agreement to negotiate, Atlantic and Reconstruction Finance Corporation (then successor to Defense Plant Corporation) entered into a contract dated February 16, 1949 (R. 99-104). This contract provides in part (R. 100):

> "Whereas, the [1943 Atlantic contract] provides . . . that at the end of the first five-year period the Buyer and Seller shall reach an agreement as to the price for gas sold and delivered under this contract to be effective during the second five year period; and
>
> "Whereas . . . ; and
>
> "Whereas, *an agreement was reached* between Buyer and Seller *as to the purchase price* for the period [to March 1, 1949] . . . , and it is desired by the parties hereto that a *new agreement* be reached as to the price to be effective during the remainder of the second five year period of the contract."

The contract of February 16, 1949 (R. 99-104), in addition to amending certain quantity provisions of the previous contract of September 1, 1943, provides (R. 100):

> "Paragraph III of the said contract of September 1, 1943, is hereby amended to provide that, for

> the period beginning March 1, 1949, *and ending August 31, 1953,* the price for gas shall be five cents (5¢) net per one thousand (1,000) cubic feet. . . ."

On May 11, 1949 the pipe line (Louisiana) succeeded to the rights and obligations as purchaser of the North Tepetate gas from Atlantic (R. 105). On August 27, 1953, the pipe line wrote to Atlantic advising that the "price provisions [of the prior amendments to the 1943 Atlantic contract] expire on August 31, 1953" and evidenced willingness "to commence negotiations with you concerning such price" (R. 36-37). Pursuant to this request and starting in September, 1953, negotiations took place looking toward agreement on price between Atlantic and the pipe line. At least four meetings were held and there were numerous telephone conversations, with negotiations lasting over a period of approximately 5½ months (R. 25), and finally culminating in a written contract between Atlantic and the pipe line dated February 17, 1954 (R. 46).

Participating in the negotiations were W. L. Bowser (a witness at the hearing) and other parties representing Atlantic; and B. C. Adams, Jr., Vice President, and H. L. Mann, Vice President, together with other parties representing the pipe line (R. 21). The parties had difficulty coming to agreement; Atlantic contended for about 16¢ per Mcf, while the pipe line contended for 8.99¢ per Mcf (R. 23, 25). Mr. Bowser of Atlantic who negotiated both the 1943 and the 1954 contracts (R. 19-20, 21), and whose testimony was not disputed, testified that the contract did not specify a workable formula (R. 24-25) and that after many meetings and prolonged negotiations (R. 25):

> ". . . we finally haggled back and forth . . . they said, 'This is as high as we are going', and we said,

› can get that agreed to'. And
anagement, reached an agree-
tter of agreement."
you horse-traded it out? A.

on the 12.5¢ price retroactive
ospective to August 31, 1958.
claim was a contract which
id which is referred to herein
reement, reads as follows (R.

ptember 1, 1943, Defense Plant
r, entered into a gas purchase
tlantic Refining Company, as
hase of gas produced from
North Tepetate pool of Acadia
ich contract was subsequently
1949. Louisiana Natural Gas
d the pipe line operated by
cation and the aforesaid con-
ntic Refining Company was
Natural Gas Corporation.
ith Paragraph III of said con-
reed that the price to be paid
Gas Corporation to The Atlan-
y for gas sold and delivered
between September 1, 1953, and
h inclusive, shall be 12.2 cents
bic feet at a pressure base of
received at the central point
n the original contract, regard-
gas is delivered to a government
addition, Buyer shall reimburse
severance taxes, or similar taxes,
gated to pay and has paid to the
on such gas."

The agreement was "Agreed to and Accepted this 22nd day of February, 1954" by the pipe line (R. 47). On the same date, H. L. Mann, Vice President of the pipe line who participated in negotiating the contract and who executed it in behalf of the pipe line, returned the document to Atlantic with a letter reading in part as follows (R. 47-48):

> "* * * we are enclosing * * * letter *agreement* dated February 17, 1954, *covering the sale of gas,* * * *."

Summary of Argument.

A. Our position on the question of judicial review is briefly this:

When, as here, an administrative agency decides a question of law on the basis of court decisions, and not on the basis of administrative expertise, the correctness of its determination is fully and independently reviewable by the courts. Particularly is that true in this case because in the regulatory framework of the Natural Gas Act as construed in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956), the Commission had no power to establish the initial relationship between the parties. That relationship was established by the parties in a privately negotiated contract. The Commission merely undertook the simple task of construing the non-technical language which the parties used. It did so to determine what contract price the parties had made for themselves as of June 7, 1954.

The Commission's task was twofold: (1) to construe a non-technically worded clause in a privately negotiated contract (the Shell clause) and (2) to resolve whether an undisputed set of facts (the negotiations leading up to and the making of the February 1954 agreement) consti-

tuted entry into a contract as provided for in the Shell clause. The resolution of such questions is typical of the everyday business of courts, and on the basis of comparative qualification it would seem that the Court would be better equipped than the Commission to resolve them. Therefore, unless the issues somehow required and were decided by the Commission on the basis of specialized administrative competence, the Court of Appeals was fully empowered to determine for itself whether the issues had been correctly resolved.

We shall demonstrate that no unique administrative attribute was called for or invoked by the Commission. The issues lent themselves only to judicial resolution, and the case was tried and decided on that basis. The words in the Shell clause were used in their ordinary sense, hence the construction of the clause involved solely a question of law. *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922); *Brown & Sons Lumber Co.* v. *Louisville & Nashville R. Co.*, 299 U. S. 393 (1937). See also *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481 (1958).[8]

B. The Commission did not base its determination on administrative expertise, industry usage, economic impact, or technical wording of the favored-nation clause, nor on any other administrative attribute. The Commission had no hand in formulating the Shell contract. The pertinent

---

[8] *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 358 U. S. 103 (1958) does not control this case. As we understand *Memphis*, the Commission had construed a provision in a pipe line service agreement which adhered closely to the Commission's Order 144, thus in effect construing its own language. In *Memphis*, this Court said (358 U. S. at 114): "It seems sufficient to say that the record shows that these agreements are typical of the 'tariff-and-service' arrangements contemplated by the Commission Order No. 144. . . ."

facts are clear. There was no weighing of cost allocation factors, as justness and reasonableness of the price was not involved; nor was there any question of whether the price was in the public convenience and necessity.[9] Industry usage with respect to favored-nation clauses was not raised at the hearing or relied on by the Commission as a basis of its determination, nor was any evidence introduced in that regard. No peculiarly administrative consideration went into the making of the contract or into the resolution of the issue. In brief, the question was purely judicial in nature, not administrative.[10] See *United States* v. *Western Pacific Railroad Company*, 352 U. S. 59 (1956); *United States* v. *Chesapeake & Ohio R. Co.*, 352 U. S. 77 (1956).

When, as here, the administrative agency purports to resolve a question on the basis of legal reasoning and judicial precedents, and the issue does not call for nor does the agency invoke any essentially administrative function, the correctness of its conclusion must be judged on the basis of the reasoning it invokes. *SEC* v. *Chenery Corp.*, 318 U. S. 80 (1943). Especially should that be true, we submit, when as in this instance the issue resolved is one which the statute does not expressly authorize the agency to resolve, let alone require it to do so.

Nor do considerations of uniformity enter into this case. Uniformity in the construction of contracts, where the question is one of law as here, ". . . may ultimately be

---

[9] On June 4, 1956, prior to the hearing, the Commission had issued an unconditional certificate of public convenience and necessity to Shell authorizing it to continue this sale. *In the Matter of Shell Oil Company*, Docket No. G-5035.

[10] In his brief for the Examiner, the Commission Staff Counsel even contended that the proceeding should be dismissed "in respect of the contract interpretation question" *as it was so judicial in nature the Commission had no power to resolve that question* (R. 113-114, fn. 2).

reviewed by [the Supreme] court . . . and thereby uniformity of construction may be secured." *Great Northern Rwy. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 at 290-291.[11]

The Commission resolved, solely on the basis of its concept of judicial doctrine, what was essentially a private dispute between Shell and the pipe line. Had those parties agreed on the June 7, 1954 price, the Commission would have undoubtedly accepted their figure as Shell's initial regulated price, and there would have been no hearing. The fact that, as a general proposition, an administrative agency might be endowed with a specialized competence to resolve some issues coming before it, does not mean that every issue which it resolves either calls for or gets such consideration. And unless it does—as the present issue did not—the agency's determination is fully reviewable by the courts on the basis of correctness. Otherwise, administrative expertise—even latent expertise—would be a controlling factor in itself.

C. Section 19(b) of the Natural Gas Act (App. A hereto) invests the Courts of Appeals with jurisdiction "to affirm, modify, or set aside [the Commission's] order in

---

[11] See also: *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144 (1944) where the Court said (p. 156):

> "Lastly, it is contended that we should accept the Administrator's view in deference to administrative construction. The administrative ruling in this case was no sooner made than challenged. We cannot be certain how far it was determined by the considerations advanced, [including uniformity] mistakenly as we think, in its defense in this case. It has hardly seasoned or broadened into a settled administrative practice. If Congress had deemed it necessary or even appropriate that the Administrator's order should in effect be final in construing the scope of the national price-fixing policy, it would not have been at a loss for words to say so. We do not think it should overweigh the considerations we have set forth as to the proper construction of the statute."

whole or in part." While §19(b) is silent as to the court's review power with respect to Commission conclusions of law, it does provide that the "finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." It further provides that the "judgment and decree of the court [of appeals], affirming, modifying or setting aside, in whole or in part, any such order of the Commission, shall be final," subject to review by this Court.

Section 19(b) clearly contemplates that there will be no limitation on the court's power to review for itself the Commission's conclusions of law. The specification of limitation on review as to Commission fact findings, together with the section's silence as to other Commission conclusions, makes this clear. Any doubt in that regard is resolved by §10(e) of the Administrative Procedure Act (App. B hereto) which, except so far as the statute precludes judicial review or agency action is by law committed to agency discretion (neither of which is present here), requires that "the reviewing court *shall decide all relevant questions of law . . .*"

Merchants Elevator (259 U. S. 285), *supra*, and *Brown & Sons Lumber* (299 U. S. 393), *supra*, hold that tariff construction "presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute", 259 U. S. at 291, and, *ibid.*, "When the words of an instrument are used in their ordinary meaning, their construction presents a question solely of law." The principle of those cases, together with the provisions of §19(b) of the Natural Gas Act and §10(e) of the Administrative Procedure Act, make clear that the Court of Appeals was empowered to determine for itself whether the Commission had *correctly* resolved the issue.

II.

The Court of Appeals correctly concluded that the Shell clause was activated by the February 17, 1954 agreement. The Commission (1) misread and improperly injected into the Shell clause language which the parties neither used nor intended, (2) erred as a matter of law in concluding that the February 17, 1954 agreement did not constitute entry into a contract, and (3) by its foregoing errors, largely defeated the purpose of the clause, thus completely distorting the agreement of the parties which they clearly expressed in their contract.

A. The Commission improperly injected language into the Shell clause. But what is even more serious, it went on to conclude that the February 1954 agreement was not a contract within its revised wording of the clause. The Commission construed the Shell clause to require a "new" contract (R. 130, 147). But the clause permits of no such interpolation. We have not challenged the Commission's power to determine what contractual price the parties fixed for themselves at a given date; we do challenge its right to create by construction a contract the parties neither made nor intended.[12]

The Commission did *not* conclude that the Shell clause required the pipe line to enter into a *new* contract covering a

---

[12] Petitioners do not appear to deny that the *usual* objective of a favored nation price clause in a gas purchase contract is to give the seller a top price, as the court below correctly observed in passing. Rather they contend that there are *limitations* upon the general coverage of these clauses and that the *limitation* in this case excluded the February 1954 agreement (Govt. Br. pp. 31, 33-34, 44; Br. of Texas Gas and Louisville pp. 21, 27, 28). Since the Commission employed ordinary rules of construction it should have construed the *limitation* strictly, especially since it was prepared by the pipe line. The language of the Shell clause suggests no such limitation as the Commission and petitioners contend for. If such limitation is to be maintained it can only result from construction based upon the supposed but latent intention of the pipe line to establish an exception of which its own words give no hint.

new supply of gas, as petitioners appear to view its order and as they contend the clause requires.[13] Had the Commission so construed the Shell clause it would have disposed of the matter in a sentence or two because obviously the February, 1954 agreement is not a *new gas supply contract.* But the Commission concluded that the February, 1954 contract was not a "new" contract but was merely action taken under a pre-existing contract. The Commission comes to this conclusion by reasoning that the 1943 Atlantic contract contained an arbitration clause which caused it to continue as a binding contract (R. 132, 147).

It therefore seems apparent that the Commission would have held the Shell price to have escalated if the 1943 Atlantic contract *had not contained the arbitration clause,* but had contained only the agreement-to-agree clause, because in that event the February 1954 agreement would have been a "new" contract within the Commission's reasoning, although it would not have covered a *new gas supply.* Thus it is evident that the Commission's conclusion turned on its version of the status of the February, 1954 agreement which it felt could not be another contract. The fallacy inherent in the Commission's reasoning is that an agreement cannot refer to a prior contract and at the same time itself be a contract. But there is no reason why that cannot be so. The principle is recognized in *American Colortype Co.* v. *Continental Colortype Co.*, 188 U. S. 104, 107 (1903) where the Court speaking through Mr. Justice Holmes said:

---

[13] At p. 42 of the Government's Brief, it is said the Shell clause applies only when the buyer "enters into a *new gas-supply contract.*" At p. 44 they say the Shell price would escalate "only when the buyer thereafter entered into a *new supply contract.*" See also pp. 13, 40. The Brief of Texas Gas and Louisville (p. 28) speaks in terms of the "limitation" in the clause applying "if Texas Gas should enter into a *contract for the purchase of new gas. . . .*"

> "The allegations show that, having the old contract before them, the parties came together under a new agreement, which was determined by reference to the terms of that contract, but which none the less was personal and immediate."

B. The Commission's construction defeats one of the principal purposes of the Shell clause. The clause's obvious purpose is to give the seller equality of price treatment resulting from subsequently *negotiated* agreements pursuant to which the pipe line pays a higher price for gas from another producer. The Commission's construction wipes out that purpose by creating a void in the contractual pricing arrangement which the parties obviously did not intend to exist.

It seems apparent that Shell and the pipe line intended their contract to include a comprehensive pricing arrangement. Thus the contract contains its own fixed price step-up clause (R. 65) pursuant to which Shell gets its own bargained-for protection in that regard as against other existing contracts of the pipe line.[14] The Shell contract also contains a typical "price redetermination" clause,[15] but this clause cannot be invoked during the first ten years of the contract (R. 67-68). And the contract also contains the favored nation clause (R. 66-67) which is designed to fill whatever gap might otherwise exist, thus assuring to

---

[14] We do not contend that the Shell clause covers future higher prices paid by the pipe line as the result of post-1951 fixed price step-ups taking place under pre-1952 contracts. As noted, Shell got its own bargain in that respect. Additionally, the pipe line's contract with Atlantic *does not* contain a fixed price step-up clause, hence there was no occasion for the pipe line to have prepared the clause to give Shell price equality with Atlantic in that regard.

[15] Under this clause the parties, beginning January 1, 1962 and January 1, 1967, *redetermine* the contract price to equal the average of the three highest prices then being paid in a specified area, with the contract's then current price as a minimum (R. 67-68).

Shell equal higher price treatment which the pipe line might thereafter agree to pay under *negotiated* agreements.

Yet the Commission construed the Shell clause so as to carve into it a gap which the clause's language does not fairly admit of and which the parties obviously did not intend should exist. Shell and the royalty owners under its leases from which the gas is produced would be just as adversely affected by the pipe line paying a higher price under a newly *negotiated* agreement arising out of a pre-existing arrangement as they would by a higher price resulting from the pipe line entering into a contract covering a new supply of gas. And that, of course, is why the clause merely calls for entry into "*a contract*" for the purchase of gas at a higher price and is not limited to a new supply of gas, as it would have provided had that been the intention. It would, we submit, be a distortion of the basic concept and purpose of the clause to permit its avoidance in the circumstances of this case by injecting into it, as the Commission did, a limitation which was significantly omitted.

C. Even if the Shell clause requires entry into a "new" contract, as the Commission erroneously held, the February 17, 1954 contract nonetheless fulfilled the clause.

The Commission reasoned that the February, 1954 agreement was not a "new" contract because it "merely represents action taken under a pre-existing contract" (R. 130). In this respect the Commission erroneously concluded that another contract cannot arise out of a pre-existing contractual relationship between the parties. That, of course, is not so. *American Colortype Co.* v. *Continental Colortype Co.*, 188 U. S. 104, *supra*.

The Court of Appeals properly read the Shell clause as it is written, and concluded that if the February 17, 1954 agreement was not an entering of a contract "we are

at a loss as to how it would be properly and legally characterized" (R. 164). If the February, 1954 agreement constituted entry into a contract, as it undoubtedly did, that was unquestionably a "new" contract for the simple reason that it existed for the first time. The negotiated agreement of February, 1954 established for the first time the contract price at which Atlantic would sell its gas and the pipe line would buy it for the five-year term beginning September 1, 1953. A negotiated agreement supplying the essential element of price at which a commodity is to be bought and sold for a fixed period of time, if it is a contract at all—as this one clearly was—is certainly a "new" contract.

Therefore, even though the Commission put "new" into the Shell clause, it still erred in concluding that the February, 1954 agreement did not meet the clause. Had the Commission construed the Shell clause to require entry by the pipe line into a purchase of new gas from new sources of supply (which it did not, but which petitioners now say the clause required—see fn. 13, p. 17, *supra*) it would of course have disposed of the matter very briefly. But the Commission did not do that, and the reason no doubt is that the Commission realized that the Shell clause could not be stretched to that extreme.

D. In any event, and for the foregoing reasons, the conclusion of the Commission was not reasonably supported and its order was properly vacated by the Court of Appeals. Having erroneously applied—or failed to apply—basic legal concepts and doctrine to a clear factual situation, there was no rational or reasonable basis to support the Commission's determination. Therefore, in any event, the judgment of the Court of Appeals should be affirmed.

Argument.

The hearing was convened by the Commission due to the fact that when the Shell contract was filed the buyer and seller were in dispute as to whether an increase had taken place.[16] The resolution of this private dispute necessitated construction of a price clause which called for entry by buyer into a contract providing for the purchase of gas at a higher price, in the light of the buyer's having subsequently entered into a *negotiated agreement* with another seller of gas pursuant to which the parties established the contract price for the term September 1, 1953 to August 31, 1958 (R. 46).

The Examiner held the Shell price was increased by the February 17, 1954 agreement (R. 112-126). He found that the Atlantic clause "is a provision for price *negotiation* for 5-year periods subsequent to the first 5-year period" (R. 119), and that "it is obvious, of course, that the [Atlantic] clause is *not* (emphasis in original) a 5-year periodic price escalation clause having fixed and agreed upon steps" (R. 124).

The Examiner went on to conclude (R. 123):

> "The escalation clause did *not* (emphasis in the original) require a complete *gas purchase contract*, . . . It merely required that the 'Buyer shall enter into a contract providing for the purchase by it of gas' etc. It did not require a new or different source of gas than Buyer had theretofore contracted for. It merely provided for 'gas produced from a field or fields located, and delivered to Buyer, within a

---

[16] In the Commission's order for hearing it is provided (R. 111):

> "It further appears that the issue of Shell's rates and charges effective on June 7, 1954 . . . is the subject of proposed litigation between the parties to the contract."

> **radius of fifty (50) miles of any point of delivery provided hereunder . . .' . . . The language is clear enough to reveal the intent of the parties without resort to parole evidence or self-serving memoranda. To miss its plain meaning is to do violence to the generally accepted and reasonable meaning of the sequence of the words of the English language used. The simplest analysis reveals the heart of the matter. Shell sought to cause its selling price to rise to that called for by any other contract Buyer made for gas after an agreed date . . . if the gas was produced in the same general area of competition as agreed upon (50 miles). The language was evidently broad; not narrowly technical in character."**

The Commission reversed its Examiner. The Court of Appeals vacated the Commission's order (R. 160-165).

Petitioners argue that the Commission reached its conclusion on the basis of its expertise and intimate knowledge of the industry's understanding of the meaning of different types of favored nation clauses; and that the Shell clause was worded as it is for the economic benefit of the pipe line. But petitioners do not point out wherein the Commission brought any of these factors into play, nor where there was any evidence to support them. Surely the Commission's belated reference to the other Shell contracts in its order denying rehearing cannot have that all-inclusive effect.

I.

On review of the Commission's order the court below was fully empowered to decide for itself whether the Commission had correctly resolved the issue.

A. The Commission resolved a question solely of law.

In reaching its conclusion the Commission did not purport to draw or rely upon specialized competence, expertise or other administrative specialty; nor did it consider or base its conclusion upon industry practice or economic impact; nor would the evidence in this record support any such conclusion. Since the matter at issue required only the construction of words used in an ordinary, non-technical sense in a privately negotiated contract, together with the determination of whether a given set of facts constituted entry into a contract, there was no occasion for the invocation of administrative expertise, industry practice, or economic impact; and the Commission did not invoke any of them.

We do not contend that every Commission order which resolves a question which might qualify as one of "law" rather than "fact", is fully judicially reviewable on the basis of correctness rather than reasonableness. We recognize that there may be instances where the issue, though classifiable as one of "law", is so intertwined with some underlying administrative consideration that the agency's determination should not be set aside if reasonably supported. But that is not this case. Here the Commission merely construed the ordinary words of a contract as it supposed a court would have construed them. In our view, it would be unreasonable to say that when an agency conclusion is based upon its version of court-established principles, the courts themselves who establish those principles

cannot inquire into the correctness of the agency's conclusion based upon them.

This case, we submit, is within the principle of this Court's decisions in *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, *supra*, and *Brown & Sons Lumber Co.* v. *Louisville & Nashville R. Co.*, 299 U. S. 393, *supra*, the latter of which involved an order of the Interstate Commerce Commission, with suit having been filed in a federal district court on the basis of the Commission's order construing its "Jones" or "Combination Rule" which was applicable to the carriers' tariffs, and which dealt with permissible increases in rates on certain routes. This Court said, 299 U. S. at 397:

> "The shippers made reclamation, on the ground that the Combination Rule applies in every case where no joint through rate has been published over the route selected for movement. The Commission sustained the shippers' claim."

In differing with the Commission and affirming the Court of Appeals, it was held (299 U. S. at 397):

> "The rule declares that the prescribed formula is to be applied 'where no published through rates are in effect from point of origin to destination.' The language used is not technical. The meaning of the words is clear. There is no ambiguity. *The construction of these railroad tariffs presents, therefore, a question of law, not differing in character from those presented when the construction of any other document is in dispute. Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291, 66 L. ed. 943, 946, 42 S. Ct. 477. As, in each instance, there was available some through route from point of origin to destination for which joint through rates had been published, the rule, by its terms has no application.

We so hold despite the construction given to the rule by the Commission.

"The shippers contend that the construction given to the rule by the Commission is conclusive, because preliminary resort to the Commission was necessary [citations]. They argue that such preliminary resort was necessary, since the interpretation and application of the rule involved (a) the exercise of sound administrative discretion as to technical and intricate matters of tariff application and the relation of tariffs one to another; (b) the reasonableness of a practice of routing as between higher and lower-rated routes, and (c) uniformity in the application of rates, which is the paramount purpose of the Interstate Commerce Act. ***But the argument is not sound.*** To determine whether the rule was applicable to the several shipments does not call for, or indeed permit, the consideration of any of these matters. ***The simple question for decision, as to each shipment, is whether there existed 'published through rates' 'in effect from point of origin to destination.' The determination of that question requires ordinarily merely the examination of the tariffs. The enquiry would, in all respects, be like that commonly made by courts when called upon to construe and apply any other document*** * * * ***Here, the shippers might have brought their action at law without resort to the Commission."***[17]

---

[17] See also *Phillips Petroleum Company* v. *Federal Power Commission*, 10 Cir., 227 F. 2d 470, cert. den. 350 U. S. 1005, *sub. nom. Michigan Wisconsin Pipe Line Co.* v. *Phillips Petroleum Company*, where, on review of a Commission order interpreting its own regulations and a gas purchase contract, the Court reversed the Commission, holding (227 F. 2d at 476):

> "We hold, therefore, that the [Commission's] orders of October 1st and December 8th were timely; that they were subject to review under Section 19(b) *as presenting purely questions of law involving the construction of a contract.* . . ."

Later decisions do not detract from *Brown & Sons* and *Merchants Elevator;* the latter, in fact, being referred to in *United States* v. *Western Pacific R. Co.,* 352 U. S. 59, *supra,* with the observation that (352 U. S. at 65-66): "There the Court held that where the question is simply one of construction the courts may pass on it as an issue 'solely of law.' " In *Western Pacific,* the Court also said (352 U. S. at 69):

> "By no means do we imply that matters of tariff construction are never cognizable in the courts. We adhere to the distinctions laid down in Great Northern R. Co. *v.* Merchants Elevator Co. (U. S.) *supra,* which call for decision based on the particular facts of each case. . . . We say merely that where, as here, the problem of cost-allocation is relevant, and where therefore the questions of construction and reasonableness are so intertwined that the same factors are determinative on both issues, then it is the Commission which must first pass on them."

We are not here concerned, as in *Western Pacific,* with the doctrine of primary jurisdiction, although we concede the interrelationship of some of the principles between primary jurisdiction and judicial review.[18] Here, the Commission passed on the issue. Actually, its view of the matter goes to confirm that we have here none of the factors which might have motivated a court to refer the issue to the agency for primary consideration had it gone to a court in the first place. We do not contend that the Commission did not have jurisdiction. Nor do we now urge that had the issue first gone to a court it could not properly have been referred to the Commission for its primary

---

[18] See 4 Davis, *Administrative Law Treatise,* §30.09, p. 242, fn. 7 (1958).

consideration,[19] although that is a matter of some doubt. Our position is that, having gone first to the decisional level before the Commission and having been treated there in no light other than a court would have treated the question, the reviewing court is authorized to decide the question for itself.[20]

That appears to be within the general area of the result reached in the litigation involving the validity of the dual-rate systems of shipping conferences culminating in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481 (1958), involving court review of a Maritime Board order approving under the Shipping Act a dual-rate system of a shipping conference. The Court recognized the propriety of the divi-

---

[19] In *Southwestern Sugar and Molasses Co.* v. *River Terminals Corp.*, 360 U. S. 411, 420 (1959) the question of the validity of an exculpatory clause in a towboat's tariff on file with I. C. C. was held referable to the Commission, but the Court assumed that the question was "one appropriate ultimately for judicial rather than administrative resolution."

[20] See also *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, *supra*, in which the Court said (347 U. S. at pp. 677-678):

> "The Commission found that Phillips' sales are part of the production and gathering process, or are 'at least an exempt incident thereof.' This determination appears to have been based primarily on the Commission's reading of legislative history and its interpretation of certain decisions of this Court. Also, there is some testimony in the record to the effect that the meaning of 'gathering' commonly accepted in the natural-gas industry comprehends the sales incident to the physical activity of collecting and processing the gas. Petitioners contend that the Commission's finding has a reasonable basis in law and is supported by substantial evidence of record and therefore should be accepted by the courts, particularly since the Commission has 'consistently' interpreted the Act as not conferring jurisdiction over companies such as Phillips. See Gray v. Powell, 314 US 402, 86 L ed 301, 62 S Ct 326; N. L. R. B. v. Hearst Publications, Inc. 322 US 111, 88 L ed 1170, 64 S Ct 851. We are of the opinion, however, that the finding is without adequate basis in law, and that production and gathering, in the sense that those terms are used in § 1 (b), end before the sales by Phillips occur."

sion of functions between court and agency under which the latter "makes a preliminary comprehensive investigation of all facts, analyzes them, and applies to them a statutory scheme as it is construed" (356 U. S. at 498). Thus the employment of the primary jurisdiction doctrine is "to prepare the way, if litigation should take its ultimate course, *for a more informed and precise determination by the Court* of the scope and meaning of the statute as applied to those particular circumstances" (356 U. S. at 498-499).

In this case there was no question of reasonableness of the rate; no problem of cost-allocation or other factor inherent in the determination of reasonable rates; and no question of natural gas policy, or of industry practice or the economic impact of favored nation clauses. The sole question was *what was* the effective contract price at a given date under a privately negotiated contract, not whether it was a lawful or reasonable price. Thus the Commission decided a question solely of law, and under the principle of the foregoing cases its conclusion was fully reviewable as to its correctness.

B. The Commission did not resolve the issue on the basis of expertise, industry practice, or economic impact, nor did the issue permit such determination.

The Commission resolved the issue solely on its conception of judicial doctrine. Not a single reference is made by the Commission to any technical or special word, phrase or circumstance which even tends to tint the issue with uniqueness. Nothing is said of the economic impact of different kinds of price increase clauses. Not a word is mentioned about industry understanding or usage.[21] Nor is there a

[21] The Commission's belated reference in its order denying rehearing to a selected few other contracts entered into by Shell

single word of testimony in the record dealing with any of these factors, and we deny that any industry understanding exists as to various "types" of favored nation clauses.

On the contrary, the Commission's original order (R. 126-137) and its order denying rehearing (R. 143-150) show undeniably that the Commission gave no consideration to specialized know-how or industry practice or economic impact. The Commission relied upon court decisions and legal texts as the sole basis for its conclusion. The following makes this clear:

(1) After concluding that the effective price was determined by the amount of money changing hands on June 7, 1954 rather than by the contract price (R. 129), the Commission, "as an alternative ground" determined that the price had not increased, because (R. 130):

> "The agreement with Atlantic does not constitute a *new* contract as required by Shell's escalation clause, but merely represents action taken under a pre-existing contract between Texas Gas and Atlantic."

(2) Noting that *"Shell's contract was prepared by Texas Gas"* (R. 130), and that the arbitration clause in the Atlantic contract "makes it clear that where the parties are unable to agree arbitration of the price dispute is assured" (R. 131), the Commission states the question thus (R. 132):

---

with other pipe lines was not for the purpose of indicating *industry understanding* of the meaning of differently worded favored-nation clauses. The other contracts were those of Shell only and did not include any other producers. When he was permitted to introduce these other contracts in evidence despite objection by Shell's counsel, the attorney for the pipe line stated that they were competent to show "difference in the language of the clauses and *infer* therefrom a difference in the meaning of what shall be done thereunder" (R. 29). Thus the contracts were not even introduced for the purpose of showing industry usage.

> "The question before us is whether the letter agreement constitutes a *new* contract for the purchase of gas or whether it merely represents action taken pursuant to the pre-existing 1943 Atlantic contract."

(3) After stating that (R. 132) "We believe the latter is the correct view," and saying that its conclusion made it unnecessary to consider whether the Atlantic contract contained a "certain enough" standard to extend the contract after the first five-year period because "paragraph (d) provides for a definite method by which a price will be fixed in case the parties fail to agree" (R. 132), the Commission devotes the rest of its order attempting to justify its conclusion on judicial doctrine, and starts out by saying (R. 132):

> "*The cases show* that a contract will not fail for want of certainty where a future price is to be fixed by arbitrators or other third parties (citations)."

After discussing the court cases, the Commission observes (R. 133):

> "*We do not think that any possible view as to the applicable state law alters this conclusion.*"[22]

Then follows a discussion of legal authorities including the Restatement of Conflict of Laws, the Uniform Sales Act, and certain Articles of the Louisiana Civil Code and cases decided by the Louisiana courts, including what we believe to be a misinterpretation of a French commentator's views (R. 133, 134), with the conclusion (R. 134):

---

[22] One of the legal issues before the Commission (and the Court of Appeals) was what law governed validity and enforeability of the Atlantic contract. We have always contended that Louisiana law, the place of performance, governed, but that is a part of the issue which the Court of Appeals felt unnecessary to pass on.

> "*Because the questions of law here involved* have been adequately briefed before the presiding examiner we do not believe any purpose would be served by holding oral argument as requested by Shell."

In the concurring statement by one of the Commissioners, he observes that (R. 136) "The primary responsibility for the interpretation of the *legal effect* of tariff or rate schedules filed by regulated companies vests in the regulatory agency with whom they are filed."[23] The Commissioner goes on to state that the interpretation of the contract "in its capacity as a rate schedule" is the Commission's responsibility and "to the extent that the discharge of this responsibility requires the interpretation of the legal effect of a given set of facts in the light of its terms and conditions, we have the right and the duty to do so." (R. 136-137).

Since the so-called "rate schedule" was nothing more than a privately negotiated contract entered into several years before the Commission assumed jurisdiction, and since natural gas companies are free to make private contracts (*United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, *supra*), and since the Commission set

---

[23] The Commissioner says that preliminary resort to the Commission is required "*because* the inquiry is essentially one of fact and of discretion in technical matters" (R. 136). We submit that preliminary resort to an administrative agency is not required *because* of those factors but only *when* the inquiry is such. The Commission instituted this proceeding not for the reasons stated by the concurring Commissioner, but because Shell subsequently filed an increased rate which was suspended and the Commission felt it "would, of course, be necessary in connection with any rate proceeding after suspension of increased rates, such as the proceeding actually instituted against Shell by our order issued March 13, 1957, in Docket No. G-12192, that we know the rate previously in effect both for the purposes of the proceeding and in computing refunds if it should turn out that the new rate, or part of it, was not justified" (R. 128).

out only to construe the contract to determine what price the parties had contractually fixed for themselves and thus settle a private dispute, it is difficult to see how the Commission could construe this "rate schedule" in any capacity other than a private contract.

In its order denying rehearing the Commission reiterates that the Shell price had not increased "although Texas Gas *had entered into a letter agreement for the purchase of gas* at 12.5 cents per Mcf . . . from The Atlantic Refining Company" (R. 144). The order on rehearing is concerned primarily with the circumstance that the Atlantic contract embodied a "contract to determine the price by arbitration, and this contract is not invalid . . ." (R. 146). After so concluding the Commission adds (R. 147):

> "*We may add at this point* that where Shell and its buyer did intend that escalations take place when prices were raised under either old or new contracts, language was used calculated to achieve this result, which may be compared with that used in Shell's contract with Texas Gas quoted in our previous order. *While we do not wish to be considered as interpreting such language here,* the contrast with the language used in Shell's contract with Texas Gas is significant."

This rather belated remark coming for the first time in the order denying rehearing can hardly be taken to have the overriding effect of transforming the Commission's judicial approach into an administrative one so that it would follow that the Commission reached its result on the basis of industry practice or understanding. As the Commission appears clearly to indicate, it referred to these other contracts not to show that each was exclusively representative

of a set industry pattern, but merely to show that by contrast in language in different contracts entered into by Shell, it felt that a different intent was indicated on the face of the language used in the instant contract.

We submit that in this dictum the Commission again fell into error. These other contracts made with other pipe lines under different circumstances and in different producing fields have no relevancy in casting light on what was meant by the instant contract, especially when, as here, the record shows what was intended to be accomplished by the Shell clause (R. 13-14, 15). Additionally, a showing that some favored-nation clauses apply to *any* higher price paid by the pipe line does not help in solving this case; it only demonstrates that the *usual* clause is all-inclusive and any *limitation* thereon should be clearly expressed. If resort is to be had to other contracts to show what the instant clause meant, particularly as our clause was prepared by the pipe line, we submit that when pipe lines intend to limit the favored nation clause so that the price will escalate only when they enter into a subsequent contract covering a new supply of gas, they say so.

In hearings before the House Committee, 84th Cong. 1st Sess. on H. R. 4560 (Harris Bill), there was submitted to the Committee a sampling of favored nation clauses. The example of a "Two-Party Favored Nation Clause" is reproduced at p. 689 of the Committee's Report of the hearings, and reads in pertinent part as follows:

> "3.(a) Buyer agrees that if, during the term of this contract it purchases from producers ***new gas from new sources of supply*** in the State of Louisiana south of a line . . . at a basic price schedule more favorable to Seller than that provided in this contract . . . Buyer shall thereupon notify Seller in writing of

such other purchase, submitting to Seller a copy of the new gas purchase contract . . .''[24]

The above example shows that when pipe lines want to limit favored nation clauses to future purchases of ''new sources of supply'', it is a simple matter to say so, and they do.

It is submitted that the Commission did not decide this case on the basis of administrative expertise, nor was there occasion for it to do so. It resolved the issues on its view of the law. Therefore, its order was fully reviewable.[25] *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, *supra*.[26]

---

[24] In the Committee report on H. R. 6645, 84th Cong., 1st Sess. (House Report No. 992, 84th Cong., 1st Sess., p. 8), it is stated:

> ''According to testimony presented to the committee in the hearings, the various types of escalation clauses are principally the following:
>
> 1. The two-party favored nation clause: Under this clause the specified price in a long-term fixed contract is increased in the event the buying pipeline company shall pay a higher price to another producer for gas in the same field or in any area specified in the contract.''

It is noteworthy that, while the Committee describes the various types of escalation clauses, no mention is made of any so-called ''future'' type of favored nation clause.

[25] The Commission does not mention industry usage and we submit that none in fact exists. Every favored nation clause stands on its own wording. Had the Commission *sub silentio* assumed a usage to exist, it should have made known its assumption so Shell would have had an opportunity to show the contrary. Section 7 (d) of the Administrative Procedure Act (60 Stat. 241, 5 U S. C. §1006 (d)) would appear to make this necessary. That section provides in pertinent part:

> ''Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.''

And, ''whether usage exists is a question of fact'', Williston on Contracts (Rev. Ed.), Vol. 3, §662.

[26] See also *Federal Communications Commmission* v. *RCA Communications*, 346 U. S. 86, 91 (1953), where the Court stated:

> ''Since the Commission professed to dispose of the case merely upon its view of a principle which it derived from the statute and did not base its conclusion on matters within its own special competence, it is for us to determine what the governing principle is.''

C. Section 19 (b) of the Gas Act and §10 (e) of the Administrative Procedure Act make it clear that questions of law are fully and independently reviewable as to their correctness.

Section 10 (e) requires that the reviewing court "*shall* decide all relevant questions of law." (App. B. hereto). If we are right in our view that the Commission disposed of this case by resolving only a question of law, and if it be true that the question of contract interpretation in the instant circumstances was "relevant"—as we submit to be beyond doubt—then unless §10 (e) is to be completely disregarded, it seems to us that it fully empowered the court below to decide the question for itself.

While §19 (b) of the Gas Act does not specifically authorize the reviewing court to decide questions of law for itself, yet when that section is read in full and considered together with §10 (e) of the Administrative Procedure Act, it becomes apparent that the court is so empowered. If that is not so, and if on pure law questions the agency's determination is undisturbable if merely "reasonably supported", it would seem that the reviewing court's power under §19 (b) "to affirm, modify, or set aside the order in whole or in part" will be reduced to the mere chore of affirming the agency's order.

D. The Shell clause is not a patterned type but speaks for itself in clear ordinary language. The Commission's construction would defeat its purpose.

Petitioners, by emphasis of the expression "favored nation" clause, apparently attempt to create the impression that the Shell clause fits into one of a number of

special molds specifically designed to categorize all so-called "favored nation" price clauses used in the natural gas industry, and that the Shell clause fits snugly into the "future" type pigeonhole. They seem to feel that there are only two types of "favored nation" clauses, and no matter what a clause provides, nor what its obvious purpose is, the clause must be either what they choose to call a "future" type or an "old" type of clause. Petitioners would then have it that the Commission, fully aware of this practice, put the Shell clause into the "future" type category, hence the clause only applies when the pipeline enters into a *new supply* contract.

It is submitted that petitioners' position is wholly unfounded for these reasons:

1. The Commission did not consider industry practice or understanding in deciding this case, nor was it urged to do so, the reason no doubt being that there is no such industry practice or understanding relative to these clauses. Each clause means what it says—nothing more, nothing less. And it is not reasonable to believe the Commission was concerned with or acted upon industry practice or understanding in this case when it did not even mention any such practice or understanding.[27]

In this connection it is most significant that throughout its orders, and except for one occasion (R. 127), the Commission itself refers to the Shell clause not as a "favored nation" clause, but as an "*escalation*" clause. Thus, "The

[27] Expertise and industry practice were not urged upon the court below by any party. Additionally, §8 (b) of the Administrative Procedure Act, 60 Stat. 242, 5 U. S. C. 1007(b), requires that all decisions of administrative agencies "shall . . . include a statement of (1) findings and conclusions, *as well as the reasons or basis therefor*, upon all material issues of fact, law, or discretion presented on the record. . . ." If the Commission did base its conclusion on expertise or industry usage we are unable to find any such reason or basis in its order.

agreement with Atlantic does not constitute a new contract as required by Shell's *escalation* clause . . ." (R. 130), and ". . . within the geographical limitations of the [Shell] *escalation* clause . . ." (R. 131). See also: R. 144 line 8, 145 line 10; R. 147 line 10, where the Commission refers to the Shell clause as an *"escalation"* clause.[28] It is difficult to believe that if the Commission felt it was basing its conclusion on the Shell clause being what petitioners now call a *"future"* type *"favored nation"* clause, it would at least have referred to the clause as being a "favored nation" clause, rather than referring to it as an *"escalation"* clause, the latter of which could designate any type of price increase.

The Commission's failure to go into industry practice or understanding, or the economic impact of these clauses, is clearly understandable in view of the way in which this case was tried. No one contended that industry practice or understanding had anything to do with the case. It is true that the pipe line introduced some contracts between Shell and other parties. Each of those, however, was introduced for the purpose of showing that the other clauses applied to *any* higher prices paid by the pipeline irrespective of how the higher price was arrived at, so that a different intent could be *inferred* from the use of a differently worded clause (see fn. 21 pp. 28-29, *supra*). Not alone was there no evidence to show industry understanding about these clauses in general, but the fact of overriding importance is that there was no evidence whatsoever as to any industry

---

[28] The clause is, we concede, one of a multitude which are generally referred to as "favored nation" clauses. We have no disagreement with the clause being called a "favored nation" clause. Our disagreement is with petitioners' pigeonholing it into their newly-created "future" or "new" type and then contending that that is what the Commission did, and how the industry considers the clause. We deny both.

practice or understanding *concerning the Shell clause*. And since *that* is the clause involved here, the absence of such evidence is fatal to petitioners' post-rationalization that industry practice and understanding were the predicate for the Commission's conclusion.[29]

An indication of how this case was tried to the Commission is the way in which the pipe line, Texas Gas, urged the matter upon the Examiner and the Commission. In its brief before the Examiner, Texas Gas referred to the Shell clause and urged (Answering Brief of Texas Gas, p. 8):

> "This is not a case where the parties have used some very technical terminology which has a special meaning so peculiar to the gas industry that no one else would understand it, or where there is shorthand or cryptic use of business terminology needing definition for the layman. In short, there is nothing puzzling about the escalation provision."

And in its Exceptions and Statement of Supporting Reasons filed with the Commission, Texas Gas refers to the Shell clause thus (p. 10):

> "The language here involved, however, is nonspecialized enough so that the average reader would

---

[29] The following colloquy took place at the hearing concerning the admissibility of the other Shell contracts (R. 33-34):

> "Mr. Weston [Staff Counsel]: From the Staff point of view, I would make this point, that *there is no showing, certain, to date, of any trade practice in the formation of given categories of clauses into which the present controversy will fit, or any other controversy;* however, this does throw at least some light on the general subject."
>
> "Presiding Examiner: The situation in which the construction must take place.
>
> "Mr. Weston: Yes.
>
> "Presiding Examiner: While it doesn't necessarily tell you how to construe the words in the contract at issue here, *it does tell you you have to construe those words, not some other words, because there isn't any cut and dried pattern that it fits into. . . .*"

> easily grasp its meaning without indoctrination in trade usage."

Any doubt as to how the issue was treated by the Commission is completely dispelled by the Commission's petition for rehearing in the Court of Appeals. After observing that the Examiner did not rely on extrinsic evidence but decided the issue on the plain meaning of the Shell contract language, the Commission's petition states (pp. 3-4):

> "The Commission reversed the Examiner's holding on the Shell contract language, and concluded that *under the applicable law*, the Atlantic-Louisiana contract constituted a binding 25-year agreement and the February 1954 agreement constituted a step in the performance of that contract, not an independent five-year agreement . . . *Its decision rested explicitly on the contract language and did not incorporate any findings based on parol or extrinsic evidence, although such evidence was referred to in its order denying rehearing.*"

2. There is no general understanding in the industry that a clause such as the Shell clause is a "future" contract clause which applies only to a new supply contract. To construe the Shell clause that way would largely defeat its purpose. As shown at pp. 33-34, *supra*, when the intention is to restrict the clause's application to new supply contracts (as petitioners say was the case with the Shell clause), the contract so provides by stating: "Buyer agrees that if, during the term of this contract, *it purchases* from producers *new gas from new sources of supply*" the seller shall be entitled to the higher price. If, as petitioners contend, the Shell clause had been intended to apply only when the pipe line entered into a contract covering a new supply

of gas, it is hard to believe that an experienced pipe line would not have used language to express that intention when it prepared the clause.

There were only two witnesses at the hearing and they were called by Shell. The only testimony concerning the purpose of the clause was by Shell's witness Quinn who negotiated the contract, and he testified without challenge or dispute as follows (R. 13, 14):

> "Q. In the negotiations leading to the execution of this Shell-Louisiana Natural contract, what transpired relative to the price and particularly relative to the favored nations clause you have just identified? A. Well, of course, I might say that the two foremost considerations in this thing were term—we were asked for a 20-year term, which we hadn't done before.[30] And there came along with that, then, the price which would justify us in accepting a 20-year term at that time. At that time it was quite impossible to predict what gas prices would be down the line. *We were presented with this favored nation clause which we felt would protect us, at least would give to us the going price, the market price, as in years past in this operation.*
>
> "We had no other way, actually, to justify a 20-year contract."

At the time Shell and the pipe line entered into The 1951 Shell Contract (which rescinded and took the place

---

[30] Petitioners appear to feel that by this remark the witness meant that Shell had not theretofore made a 20-year contract anywhere. We submit that the witness was referring to Shell's position with respect to its Chalkley gas which had theretofore been contracted to Defense Plant. The Court below appears to have so construed this testimony (R. 163). The negotiations about which the witness was speaking were those leading up to the Shell-Louisiana contract of May 1, 1951. That contract, it will be noted, refers to and rescinds the prior Shell contract covering this same gas (R. 57-58).

of a 1943 contract originally between Shell and Defense Plant, see R. 57-58) the pipe line (Louisiana) was then the purchaser under the neighboring Atlantic contract (R. 105). Therefore, the pipe line surely knew of the agreement-to-agree upon price clause in the Atlantic contract and knew that at five year intervals it would have to make an agreement with Atlantic on price. If there had been the slightest intent that future contracts fixing the new price under the Atlantic contract were not to activate the Shell clause, surely the pipe line would have said so when it prepared the latter.

The Article of the Shell contract dealing with "Prices" (Article VI, R. 65-68) makes clear that the parties intended a comprehensive pricing arrangement pursuant to which Shell would receive equal price treatment with other sellers to the pipe line in the same area. In this regard it is significant that the 1951 Shell contract contains (1) a fixed price step-up clause (R. 65); (2) a favored nation clause (R. 66-67); and (3) a "price redetermination" clause (R. 67-68), but this "price redetermination" clause does not become effective until January 1, 1962, more than ten years after the contract was made (R. 67).

It is noteworthy that the 1943 Atlantic contract does *not* contain a fixed price step-up clause. That being so, it was not necessary from the standpoint of the Atlantic contract for the pipe line to give Shell a favored nation clause so extensive as to protect Shell against *all* increases.[31] But the pricing arrangement as a whole, and particularly the wording of the Shell favored nation clause, show clearly that the parties intended that Shell would be

---

[31] If in May 1951 Louisiana had any prior gas purchase contracts outstanding in the 50-mile radius of the Shell gas (none are shown in the record), Shell could protect itself by negotiating its own fixed step-ups, which it did as reflected by the step-up provision in its contract (R. 65).

protected against future *negotiated* agreements under which the pipe line agreed to pay a higher price to another producer. In no other way could Shell be treated on an equal basis.

The Government's brief actually demonstrates the reason why the Shell clause was intended to be operative in circumstances such as those presented in this case. In discussing the distinction between favored nation clauses from the seller's standpoint, the Government's brief states (pp. 35-36):

> "At the time of contracting, the seller can bargain directly for substantive concessions in its own contract similar to those in the buyer's existing contracts with other producers. Its claims for parity as against existing contracts can thus be directly negotiated and compromised, so that only the function of assuring equality with future contracts, *the terms of which cannot then be known, need be left to the 'favored-nation clause.'* "

That was precisely the function the Shell clause was designed and intended to fulfill, namely, equality with subsequent *negotiated* higher prices *which could not be known by Shell* at the time it entered into the 1951 contract. Shell and the pipe line could not possibly know in 1951 what price the pipe line and Atlantic would agree upon in the future under the Atlantic clause which called for them "to reach an agreement" and "price to be paid . . . is to be agreed upon . . ." (R. 86). It was that unknown and future-to-be-agreed-upon price which was left to the favored nation clause. The clause as drawn fulfills what would otherwise be a void in the comprehensive arrangement for price equality which was employed by the parties. The Commission's construction would create a serious gap

in this contractual arrangement and thus defeat one of the clearly intended purposes of the clause.

The language of the Shell clause suggests no such limitation as that the subsequent contract, to be a triggering one, must be a "new gas-supply contract" as the Government contends (Br. p. 42), or one "to acquire new gas" or "for the purchase of new gas" as petitioners in No. 167 contend (Br. p. 28). Language so readily handy to the pipe line would surely have been put in the clause had that been its intended purpose and had the pipe line not been in accord with Shell's understanding that the purpose of the clause was to ". . . protect us, at least would give to us the going price, the market price, as in years past in this operation" (Quinn, R. 14). But had the pipe line put language in the clause to limit it to the purchase of new supplies of gas, it is doubtful that it would have been acceptable to Shell because then it would not have given Shell the "going price" in the area. And "going price" or "market price" is just as effectively made by a higher price reached by way of an agreement-to-agree clause as by entry into a new contract covering a new supply of gas.

E. The Atlantic contract does not contain a price redetermination clause nor did the Commission so hold.

The purchaser in the 1943 Atlantic contract was "Defense Plant Corporation, a corporation created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act . . ." (R. 81). This governmental agency was purchasing the gas "for the purpose of transporting gas to plants which have been or are being constructed in the vicinity of Lake Charles, Louisiana . . ." (R. 82). If, therefore, any industry

practice existed in 1943 under which *private pipe lines* required a long-term supply of gas to satisfy lending institutions who provide capital to finance construction of the lines and to satisfy the Commission in order to receive a certificate of public convenience and necessity, neither of those considerations was present here when Defense Plant Corporation bought the Atlantic gas to supply defense plants in the Lake Charles area during World War II.[32]

In the setting in which the contract was made, it is not surprising that while the *"rights of the parties"* were to continue for the life of the field but not beyond twenty-five years (R. 90-91), the parties saw fit to leave the price open for agreement at five-year intervals.

The 1943 Atlantic price agreement clause did not contain a definite formula for determining price as is the case in a price *"redetermination"* clause, nor did the Commission hold that the Atlantic clause was a price redetermination clause, nor could it properly have so held. Yet it seems that petitioners attempt to create an impression to the contrary, by referring to the February 17, 1954 agreement as "a mere price redetermination" (Govt. Br. 36, see also pp. 39, 42, 44, 45, 50, 51) and as "price adjustment by the parties" (Govt. Br. p. 46) and "price readjustment" (Govt. Br. p. 49, fn. 22). The petitioners in No. 167 appear to do much the same thing (Br. for Texas Gas and Louisville pp. 9, 10, 17, 20, 23).

The Atlantic price clause was not a price *increase* clause. It called specifically for *"agreement as to the price for gas"* (R. 86), thus requiring that the *contract price be created*

---

[32] See p. 46 of the Government's brief where it speaks of the 1943 Atlantic contract as a long-term agreement with periodic price adjustments which it says accords with normal industry practice of employing long-term contracts.

by agreement. The contract did not contain a continuing price in the event agreement could not be reached. That, no doubt, is why the clause called for agreement *"at the beginning of such period"* (R. 86). In short, the Atlantic clause is not a "price redetermination" clause but merely a clause whereunder the parties agree that an entirely new and controlling contract price will be determined by agreement.

A typical price *"redetermination"* clause in gas contracts is a clause dealing *solely* with price *increases.* It contains a definite standard by which the *increase* is to be ascertained, using the average of the two or three highest prices being paid by interstate transporters in a designated area; and it leaves the then contract price as the continuing price if such average does not exceed it. The Shell contract, which is in the record, contains a typical price redetermination clause (R. 67-68), from which can be seen the complete dissimilarity between a "price redetermination" clause, and the Atlantic clause which calls for agreement as to price. The difference between the clauses is obvious. One, the price *redetermination* clause, calls for *increases,* gauged by a definite formula, to be calculated by simple arithmetic computation. The other, the Atlantic clause, is a unique and nondescript provision under which the contract price having completely expired, the parties *agree to agree upon the contract price* for a future term.

The nature of price redetermination clauses in gas contracts is recognized in legislation pending before Congress. H. R. 366, 86th Congress, 1st Session, §14(a)(3) defines the clause thus:

> "The 'better market clause' or 'price redetermination clause' under the terms of which the price

of the natural gas is or may be increased in the event the average of two or more prices which are paid by purchasers in a specified area is greater."[33]

II.

The Court of Appeals was correct in deciding that the February 17, 1954 agreement caused the Shell price to increase as that agreement was clearly entry into a contract by the pipe line.

A. The Decision of the Court Below.

The Commission read the Shell clause to require a new contract, and then went on to conclude that the February 1954 agreement was not a *new* contract but merely action taken pursuant to a pre-existing contract. The Court of Appeals (and the Examiner) read the clause as it is written and concluded that the February 1954 agreement constituted entry into a contract for the purchase of gas. "Actually," said the Court, "if the Louisiana-Atlantic agreement of February 17, 1954 was not an entering of a contract we are at a loss as to how it would be properly and legally characterized" (R. 164).

The Court observed that the Shell clause is *"one of the type"* of clauses commonly known as "favored nation" clauses and that the *"usual"* objective of favored nation clauses is to assure the seller a top price for its gas (R. 163). Petitioners seem to feel that, by this observation and its

---

[33] In the Government's brief (p. 32, fn. 17) it is stated: "The 'price redetermination' clause provides for an *increased* price at periodic intervals based generally upon the average of the two or three highest prices being paid for gas in a defined area." This recognition by the Government should completely destroy any implication that Atlantic and the pipe line "redetermined" the price in accordance with a *price redetermination* clause.

observation that to make the February 17, 1954 agreement retroactive to the date of the original contract is "abstractly conceivable" but to do so would "take the law out of the realm of business practicalities" (R. 164), the Court overreached itself and trod upon exclusively administrative ground.[34]

We submit that is not so. When the Court's opinion is read as a whole it is clear that the Court was merely applying the usual rules of construction to the Shell clause, including what was obviously one of the main purposes of the clause. Since the construction of the clause, with its non-technical language, presented solely a question of law, the question remained one of law before the Court as it had been before the Commission. In resolving the law

---

[34] Petitioners cite *Phillips Petroleum Co.* v. *F. P. C.*, 10 Cir., 227 F. 2d 470 (1955); cert. den. 350 U. S. 1005 (1956), to support the position that the February 1954 agreement was but performance of the 1943 agreement. The Court did say that certain letter agreements which spelled out the price which resulted from an escalator clause "were merely executory of the contract between the Parties" (p. 475). But that case involved not an agreement-to-agree clause as in the 1943 Atlantic contract, but rather an automatic price increase clause under which the price was to escalate in the same ratio as the pipe line's resale rate exceeded a stated price. The Court pointed out that (227 F. 2d at 472): "In accordance with the *'formula in the contract'* . . . the parties entered into a letter agreement. . . ." Also, at p. 475, the Court said: ". . . it is one thing to treat an escalated rate effective after June 7, 1954 as a change in rate or new schedule. It is quite another to treat a rate already in force on June 7, 1954 by virtue of the *automatic provisions of an escalator clause* in a contract as a new schedule or change in rates." And (p. 475): "But [the June 7, 1954 price] was nonetheless in force and effect and was being paid *not by force of letter agreements, but by force of the binding effect of the escalator clause which operated to fix the prescribed rate in accordance with the formula in the contract.*" It cannot here be said that after February 17, 1954 the price of 12.5¢ per MCF was being paid by virtue of any escalator clause in the Atlantic contract which fixed the price in accordance with a formula. Without the February 17, 1954 contract there was no price in the previous contract as the previous price expired on August 31, 1953 (R. 100).

question in construing the clause, the Court was therefore justified in applying the usual rules of construction, just as the Commission attempted to do. And in so doing, the Court merely looked to the purpose of the clause in the context of its use.

That the Court below was fully justified in doing so is supported by this Court's decision in *Santovincenzo* v. *Egan*, 284 U. S. 30 (1931). That case involved "the most favoured nation" clause (p. 35) in a treaty between the United States and Italy, and called for the construction of a clause in a treaty between the United States and Persia, which clause Italy contended it could benefit from by virtue of "the most favoured nation" clause in its treaty. In agreeing with Italy's construction this Court said (284 U. S. at 37):

> "In order to determine whether such a construction [of the Persia treaty] is admissible, regard should be had to the purpose of the Treaty and to the context of the provision in question."

The gist of the conclusion of the Court of Appeals is ". . . the fact cannot be avoided that, at least for purposes of the favored nation clause, the 'entering of a contract for the purchase of gas' has not been accomplished until the price has been established" (R. 164); and ". . . while there may have been enforceable means for settling the rate of payment in the event the parties could not agree, it would nonetheless be true that it was when the price was finally established, *by whatever means*,[35] that a contract had thereupon been entered" (R. 164).

---

[35] The Government says (Br. p. 50) that the Court apparently recognized that "if the price had been fixed by arbitration, no new gas-purchase contract would have resulted." In view of this express statement by the Court, the Government's assumption appears unfounded.

By observing that it was "abstractly conceivable" to view the February 1954 contract retroactively, the Court, as we view it, was merely announcing that it had given full consideration to the Commission's views, and concedes that as an abstract proposition it is sometimes conceivable to view a contract to be retroactively effective. Thus, for some purposes, a contract to sell a commodity which is subject to a condition precedent (such as fixing of price) might, as a fiction, upon ripening into a sale when the condition is supplied, be said to be retroactive to the date of the contract to sell. But it would make an unreal thing of the law to employ that fiction in the circumstances of this case and thus largely defeat the intended purpose of the Shell favored nation clause.[36]

The Court correctly laid bare the Commission's erroneous legal conclusion that the February 17, 1954 agreement did not satisfy the Shell clause as it was not a "new" contract but "merely represents action taken under a pre-existing contract" (R. 130). The erroneous premise inherent in the Commission's conclusion is that the provisions of a previous agreement cannot be carried forward into a subsequent agreement, or, that parties once having agreed cannot thereafter agree. There is no legal or logical reason why a letter agreement executed in 1954 cannot refer to a prior agreement and at the same time itself constitute a contract. See *American Colortype Co.* v. *Continental Colortype Co.*, 188 U. S. 104, *supra*.

What was the legal relationship between Atlantic and the pipe line as of September 1, 1953? The time limit of their

---

[36] There is nothing unseemly in a court noting "business practicalities" or "business realities". In *United Gas Pipe Line Co.* v. *Memphis, etc.*, 358 U. S. at 113, this Court said: "*Business reality* demands that natural gas companies should not be precluded by law from increasing the prices of their product. . . ."

previous price agreement ran out on August 31, 1953. If the parties could not agree on price, the matter of determining the price for them could be submitted to arbitrators provided one of the parties saw fit to invoke the arbitration procedure. But the parties saw fit not to resort to arbitration but rather to negotiate out their differences until they finally came to a meeting of the minds. Therefore, the question of what would have happened had they called upon arbitrators to fix the price for them is not material here. In concluding that the previous contract continued in force because it contained an arbitration clause, the Commission failed to give effect to the fact that the parties actually traded out their differences and entered into a contract. After top officials from the pipe line and Atlantic conducted extensive negotiations lasting over a period of about 5½ months (R. 25) and after having "haggled back and forth" (R. 25), they finally reached agreement and embodied their agreement in the contract of February 17, 1954. It is difficult to conceive of this agreement in any light other than entry into a contract providing for the purchase of gas by the pipe line at the new price. The end product of the negotiations—the February 17, 1954 agreement—was clearly a contract.

B. In any event the Commission's conclusion was not reasonably supported.

We have demonstrated, we believe, that the Court below was fully empowered to judge this case independently and to decide for itself whether the Commission's order was legally proper or legally erroneous. The Court, as we read its opinion, applied the usual rules of contract construction and decided that the Commission's order was legally erroneous. It may also be that by mentioning it to be "abstractly

conceivable" to make the February 17, 1954 agreement retroactive, the Court felt the Commission's conclusion was not reasonably supported. In our view it was not.

One of the basic errors of the Commission's conclusion is the assumption inherent in it that entry into a contract cannot result where an agreement grows out of a pre-existing contract. The Court of Appeals would not accept this fallacious premise; correctly laid it bare; and, with due recognition of the administrative function, remanded the case to the Commission to make the determination as to whether the Atlantic price was indeed higher than the Shell price. What the Commission failed to appreciate is that under the Shell clause it makes no difference whether the higher price results from a pre-existing arrangement or from an entirely new arrangement. The controlling factor is whether the higher price results from "ent[ry] into a contract . . .". Where a higher future price to the pipe line results *automatically* from an "old" contract, such as a fixed step-up increase under a pre-1952 contract, then we concede the Shell clause is not activated. But when the price previously paid by the pipe line under a pre-1952 gas purchase contract becomes higher than the Shell price, not by virtue of the *automatic* operation of a price escalation clause, but rather by virtue of the entry into another contract by the pipe line, then the Shell price clause is activated.

The Commission failed to recognize this distinction, although the Examiner and the Court of Appeals had no difficulty at all with it. The Commission seems to have assumed that in any instance that the pipe line had an outstanding pre-1952 contract in force, then, no matter how a price increase under such so-called "old" contract came

about, Shell could not benefit from the increase. This seems clearly to have been the Commission's approach from its statement concerning prices being raised under "either old or new contracts" (R. 147).

But the Commission's approach in this regard fails to take into account the wording of the Shell clause and the standard which the parties established in their contract. That standard called for the pipe line merely to enter into a contract after December 31, 1951 providing for the purchase of gas within the designated area at a price higher than the Shell price (R. 66-67). In essence, the controlling factor is not whether the activitating price is "raised under either old or new contracts" (R. 147) as the Commission erroneously assumes, but rather *the manner* in which the higher price comes into existence. If it results from the "ent[ry] into a contract" by the pipe line after December 31, 1951, the Shell clause is satisfied. And that, we submit, is precisely what the pipe line did when it entered into the February 17, 1954 agreement.

III.

Petitioners' post-rationalization of the Commission's decision is not supported by the record or the Commission's order.

A. Petitioners overweight the Commission's determination with expertise and industry practice and understanding. They would unduly limit the Shell clause on the unsupported basis that the pipe line's economics dictate that it must have driven a harder bargain with Shell than the clause provides, although neither the circumstances

attending the execution of the contract nor the words put into the clause can be stretched to that end. We deny that there is any industry understanding as to just what groove various types of so-called favored nation clauses fit into. Each stands upon its own wording. And aside from the fact that this case was not tried on the basis of industry practice or understanding, but rather as a straight contract interpretation case, the Commission itself did not purport to resolve the issue on the basis of administrative expertise or industry practice.

Petitioners stress heavily the fact that there were in the record certain other contracts entered into by Shell which contained favored nation price clauses pursuant to which the seller receives the benefit of *any* higher price paid by the buyer within a designated area; and that the Commission in its "we may add" observation on rehearing (R. 147) stated that "where Shell and its buyer did intend that escalations take place when prices were raised under either old or new contracts, language was used calculated to achieve this result, which may be compared with that used in Shell's contract with Texas Gas" (R. 147).

If the issue of the meaning of *the Shell clause* had revolved around industry practice or understanding, or had that even been collaterally considered, it is difficult to reconcile that fact with the fact that the record is utterly barren of evidence in that regard. Surely there would have been at least some evidence dealing with industry understanding *of the meaning of the Shell clause,* because after all, *it was the Shell clause* which was at issue, not some other clause such as those contained in the other contracts introduced in evidence by the pipe line and which concededly apply to *any* higher price paid by the buyer. Petitioners would now have the Court read the Shell clause as

if it applied only when the pipe line entered into a subsequent 30-odd page contract covering a new supply of gas. To support this position they point, not to any practice or understanding as to the effect that *the Shell clause here at issue* accomplishes that result (and we submit there is none), but rather to some other contracts which obviously cover *any* higher price paid by the pipe line. Hence, the net result of petitioners' position is that because there are some clauses which apply whenever the pipe line pays *any* higher price to another seller, whether resulting from a contract, a fixed step-up clause, or otherwise, it follows that *all other clauses* (including the Shell clause) apply only when the pipe line enters into a new contract covering a new supply of gas.

Had Shell urged in this case that its clause covered *all* higher prices paid by the pipe line, such as a fixed step-up resulting under a pre-1952 contract, then the other contracts might have some relevancy. But Shell has never made such contention. We concede the Shell clause does not apply to *all* higher prices paid by the pipe line. We contend, however, that it does apply when the higher price results from post-1951 entry into a *negotiated* agreement by the pipe line. It is for the foregoing reason that we submit the other contracts cast no light on intent in this instance. Actually, those contracts should never have come into evidence. But, at most, all they show is that on other occasions the parties made a different bargain. They do not establish that every other bargain should be construed to tilt to the other extreme.

Petitioners' position leaves no middle ground for favored nation clauses. Rather than each clause standing on its own wording, they would divide all clauses into two types. One extreme would cover every higher price. The

other extreme would only cover higher prices when the pipe line made a new contract covering a new supply of gas. There would be no in-between no matter what the consensual arrangement was. It would be anomalous to say, as petitioners in effect do, that because in some circumstances the parties to a gas purchase contract agree that the seller is to receive *all* higher prices the buyer pays to another, irrespective of how those higher prices come about, that in *all other* favored nation clauses in contracts made by that same seller, and no matter how another price clause is worded, the seller gets nothing unless the buyer pays a higher price under a new contract covering a new supply of gas. That approach would, we believe, compel gas sellers hereafter to insist that every favored nation clause be all-inclusive in its coverage.

We submit that contract rights should not be decided upon such a far fetched and erroneous assumption of industry practice as petitioners appear to assume exists. It was not proved; it was not alleged nor urged; it was not considered by the Examiner or the Commission; and in fact it does not exist. In the *Merchants Elevator* case this Court said (259 U. S. at 291-292):

> "When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law. But words are used sometimes in a peculiar meaning. Then extrinsic evidence may be necessary to determine the meaning or words appearing in the document. This is true where technical words or phrases not commonly understood are employed. *Or extrinsic evidence may be necessary to establish a usage of trade or locality* which attaches provisions not expressed in the language of the instrument. Where such a situation

> arises, and the peculiar meaning of words, *or the existence of the usage, is proved by evidence,* the function of construction is necessarily preceded by the determination of the matter of fact."

B. Petitioners urge that Shell's action after learning of the February 1954 agreement indicates a limited construction of its clause. Neither the Commission nor the Court of Appeals appears to have given any effect to this contention, though it was made to each. At any rate, the following is significant:

The pipe line was required to "forthwith notify" Shell of its entry after December 31, 1951 into a contract providing for the purchase by it of gas (R. 67). This notice was never given with respect to the February 1954 agreement (R. 16, 35). In failing to give the required notice, the pipe line acted at its own risk. If it gave the matter any consideration at all, it may have felt that the 1954 contract did not activate the Shell price, although its own Vice President contemporaneously classified that contract as an *"agreement . . . covering the sale of gas"* (R. 47-48). No matter the reason, the fact remains that notice was not given, and this failure to comply with its notice obligation by the pipe line is the *sole* reason for Shell having to ferret out the details which should have been supplied by the pipe line. It is the cause of whatever delay there was on Shell's part.

After Shell accidentally learned of the 1954 agreement (R. 16), it had to gather the data (a copy of the 1943 Atlantic contract and a copy of the 1954 Atlantic contract) and consume the required time to support its position that it "had a new price coming up" (R. 16, 34). The evidence is clear that since learning of the February 1954 agreement, Shell has consistently adhered to its position that it was entitled to receive for its Chalkley gas the same price which

Atlantic received since September 1, 1953 for its gas sold under the February 1954 contract (R. 16-18).

Whatever Shell's delay in *communicating* its position to the pipe line, that delay is attributable solely to the pipe line's failure to comply with its obligation under the contract. The contract required no notice from Shell. The only requirement for notice called for the pipe line to notify Shell, and that notice was never given. Certainly a party cannot use its own dereliction to advantage.

With respect to Shell cashing the pipe line's checks, the fact is that at all times Shell was entitled to receive *at least* the amounts represented by these checks. There is nothing on the checks to indicate that the amounts thereof were to be in full settlement of any disputed amounts which might exist between the parties. There is nothing to show, and it could not have been shown, that Shell accepted these checks in satisfaction of its then active claim. The routine acceptance of checks for an amount admittedly due and owing does not prejudice Shell's right to claim the higher price, nor indicate an intent contrary to the position which Shell has consistently maintained that it felt its price was increased by the February 1954 agreement (R. 17, 18).

As to the auditor's routine confirmation letters, Shell received two of these prior to its October 11, 1954 letter to the pipe line (R. 35-36). The first of these letters is dated January 21, 1954 and was signed by Shell's accountant on January 28, 1954 (Ex. 12, R. 50-51). Since both dates were prior to the contract of February 17, 1954, this letter can have no possible effect in this case. The second letter is dated August 10, 1954, but does not show the date when it was signed by Shell (Ex. 12, R. 51-52). At any rate, the letter was signed by Shell's accountant at a time when Shell's Gas and Legal Departments were in the process of gathering together and considering data necessary to

ascertain Shell's legal position (R. 16, 34). Of the remaining letters, all of which were received during the period the dispute was being negotiated between Shell and the pipe line (R. 16-17), the one dated April 21, 1955, which was signed by Shell on April 27, 1955 (Ex. 12, R. 52-53), notes Shell's exception that the balance shown does not include "our claim for price increase of $.03503 on 7,568,213 Mcf of gas sold from 9/1/53 through 3/31/55" (R. 53).

These letters are no more than routine inquiries being made for information of outside auditors to ascertain whether the pipe line was correctly paying bills which its own records reflected it should have paid. Even had Shell's accountant excepted to all of these routine inquiries, as he did to the one of April 21, 1955, it is doubtful that such exception would ever have come to the attention of the pipe line, as the letters were returned to the outside accountants and there is nothing in the record to show that the pipe line ever had knowledge of Shell's notations thereon. All but one of the letters were signed during the period when the parties were conferring with the view to settling the dispute. Thus, since Shell's position was then well known to the pipe line, and Shell was actively insisting upon its claim to the higher price, it cannot reasonably be said that the signing by Shell's accountant of these routine inquiries constitutes a practical construction by Shell that it thereby construed its price clause as not having been activated by the February 1954 contract. It is obvious that the parties understood that their differences as to the amounts payable under the contract were being held for future determination. See *Kansas Power & Light Co.* v. *Hugoton Production Co.*, 10 Cir., 251 F. 2d 946 (1958).

Shell's accountant, by accommodating the pipe line's outside auditors by confirming to them that the pipe line had credited certain amounts to Shell (like the routine act

of depositing checks for an amount admittedly due), practically all of which took place while Shell was insisting that its price had increased, cannot fairly and reasonably be said to constitute such course of conduct on Shell's part as to amount to an inconsistent practical construction resulting in Shell thereby relinquishing the very claim upon which it was then insisting.

C. Petitioners contend that the Commission's interpretation of the Shell clause furthers the purpose of the Gas Act to protect customers.

This is not a case involving whether a price is unjust and unreasonable under §5(a) of the Act, as was the case in *F. P. C.* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944); nor is this a case involving the jurisdictional coverage of the Gas Act as in *F. P. C.* v. *Interstate Natural Gas Co.*, 336 U. S. 577 (1949), and *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, *supra;* nor does this case involve the question of whether an initial price in a certificate proceeding is in the public convenience and necessity, as was the situation in *The Atlantic Refining Co.* v. *Public Service Commission*, 360 U. S. 378 (1959). This case involved solely what *was* Shell's effective price on June 7, 1954, not whether that price was lawful.[37]

The Commission is without power to establish the initial contractual relationship between a natural gas company and the purchaser of its gas. *United Gas Pipe Line Co.* v. *Mobile*

---

[37] Shell has filed for an increase to 16.75¢ per Mcf under the contract involved in this case. That increase has been suspended by the Commission and is being collected by Shell subject to refund with interest. Additionally, all of Shell's jurisdictional prices are subject to a rate proceeding instituted by the Commission under §5(a) of the Act (Docket No. G-9446 *et al.*). Shell's rate increase proceeding regarding the 16.75¢ price has been consolidated with the rate investigation, and the consolidated proceedings are set for hearing on July 7, 1960. Thus consumers are being fully protected under the appropriate sections of the Act (§§4(e) and 5(a)) against unlawful charges.

Gas Corporation, 350 U. S. 332, *supra; United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U. S. 103, *supra.*

Since Congress did not invest the Commission with power to fix initially the type of arrangement under which natural gas companies could sell gas, it is illogical to contend as petitioners in effect do, that the Commission could become indirectly endowed with such power through the medium of its interpretation of the contract. The statutory scheme of the Gas Act is amply adequate to safeguard the interests of all segments of the industry and the consuming public. By the rate review powers vested in it under §4(e) and 5(a) of the Act, the Commission is fully empowered to safeguard the gas consuming public against unreasonable charges. There is no warrant in the Act for the Commission to extend its function through the process of construction. In *United Gas Pipe Line Co.* v. *Mobile Gas Corp.*, 350 U. S. 332, 339, this Court said:

> "... (T)he Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission...."

And the Court further observed, 350 U. S. at 341:

> "... These sections [4(d), (e) and 5(a) of the Act] are simply part of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful."

Clearly, therefore, the function of the Commission in this case was not to make a price for Shell or to test the

lawfulness of Shell's price, but merely to ascertain what Shell's contract price was on June 7, 1954. While we concede petitioners' statement of the purpose of the Act, we deny that the purpose is properly invocable in this case to support the Commission's otherwise unsupportable construction of the Shell clause.

The Issue of Enforceability Which Was Not Reached by the Court of Appeals.

The Court of Appeals decided this case on one of the two issues briefed and argued to it. It assumed that the 1943 Atlantic contract imposed a binding agreement-to-agree on price in each of its last four five-year periods. "Thus", said the Court, "it has not been necessary to determine the several questions raised in connection with the arguments directed to that phase of the case. Of course if the Atlantic contract of 1943 was not a binding agreement-to-agree, that circumstance alone would place the February, 1954 Atlantic contract fully within the terms of the escalation clause in the Shell contract" (R. 165).

Before the Examiner, the Commission, and the Court of Appeals, one of the principal issues was the enforceability and binding effect of the 1943 Atlantic contract as to its last four five-year periods. On that issue, Shell has consistently contended that the law of Louisiana governed because that was the place of performance and the center of gravity of the contract; and under Louisiana law, which follows the civil law of France, a "fixed and determined" price is an absolute essential to the continued binding effect of a "contract *of* sale" or a "contract *to* sell"; and that the 1943 Atlantic contract was clearly subject to a suspensive condition (condition precedent at common law) and hence not a binding or enforceable contract as to each of its last four five-year terms until the contract price for each of those terms was actually supplied *either by agreement of the*

parties or agreement in their behalf by the arbitrators. On that basis, no obligation to sell and to buy gas arose between Atlantic and the pipe line (after the prior price expired on August 31, 1953) until they actually fixed and determined the price in the February, 1954 contract, and the presence of an arbitration clause in the contract does not alter this result. Under Louisiana law the presence of such a clause, like the agreement-to-agree itself, is merely one of the means by which the suspensive condition might be satisfied. This issue was extensively briefed and argued to the Court of Appeals.

In its petition for certiorari in No. 170 (fn. 15, p. 17) the Government states:

> "But while we think there is no doubt of the enforceability of the Atlantic contract, that issue is, we submit, immaterial in any event. The parties treated the contract as binding and complied with it, and it is not for Shell, a stranger to the contract, to say that it is not legally enforceable. . . .
>
> However, even should this Court disagree that the question is immaterial, it would not be required to decide the enforceability of the Atlantic contract. The court of appeals assumed it was enforceable for purposes of its decision, and it is that decision that presents the questions of general importance of which review is sought. Should the Court reverse that decision, it could then—if it considered the question material—remand the case to the court of appeals to determine the enforceability question."

We disagree with the Government that the enforceability question is not material. The Commission and the Court of Appeals thought it was, although the latter did not find it necessary to decide the issue. It is, we submit, very material whether the 1943 Atlantic contract was

enforceable as to its last four five-year periods, because if it was not, the parties clearly made a new contract creating legally enforceable rights and obligations which did not theretofore exist when they entered into the February, 1954 contract. The fact that Shell was not a party to the 1943 Atlantic contract is not a valid basis for saying that Shell cannot look to the status of that contract to determine whether its rights have ripened under its favored-nation clause. The very nature of the clause contemplates that that will be done, otherwise the clause would be a hollow thing with its meaning dependent solely upon what interpretation the pipe line saw fit to give to it.

While we maintain that the enforceability question is very material, we do not urge the Court to pass on that question. Petitioners do not appear to have gone into it except perhaps indirectly in footnote references (see Govt. Br. fn. 22, pp. 49-50; Br. in No. 167, fn. *, p. 24) and, in view of the Government's statement in its petition for certiorari (see above) we shall not go into the various aspects of that issue which includes a question of conflict of laws together with the application of the Louisiana law of sales to the 1943 Atlantic contract. If the Court differs with the Court of Appeals on the issue resolved, we suggest the matter be referred to the Court of Appeals for resolution of the enforceability issue.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed. In the event the judgment is not affirmed, the

matter should be remanded to the Court of Appeals to pass on the question of the enforceability of the 1943 Atlantic contract during its last four five-year periods.

Respectfully submitted,

WILLIAM F. KENNEY,
OLIVER L. STONE,
3950 R. C. A. Building,
50 West 50th Street,
New York 20, New York,
Counsel for Shell Oil Company.

GEORGE C. SCHOENBERGER, JR.,
WILLIAM W. WESTERFIELD, JR.,
Shell Building,
New Orleans 13, Louisiana,
Of Counsel.

April 1960.

APPENDIX A.

Section 19(b) of the Natural Gas Act

[as it appears in 15 U. S. C. A. §717r(b) (Supp. 1958)]

[Rehearings; court review of orders]

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals [*] of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional

---

[*] "Circuit court of appeals" was replaced by "court of appeals" by act dated June 25, 1948, effective Sept. 1, 1948 (62 Stat. 869), as amended by act dated May 24, 1949 (63 Stat. 139).

evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

APPENDIX B.

Section 10(e) of the Administrative Procedure Act

(60 Stat. 243, 5 U. S. C. 1009(e))

[SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—]

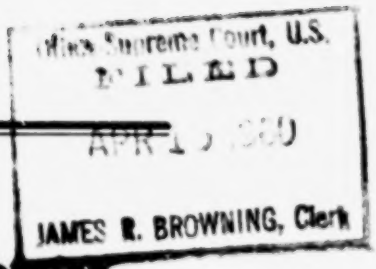
(e) *Scope of Review.*

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 [*] of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

---

[*] Sections 7 and 8 of the Administrative Procedure Act.

LIBRARY
SUPREME COURT, U. S.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

Nos. 167 and 170

TEXAS GAS TRANSMISSION CORPORATION, LOUISVILLE GAS AND ELECTRIC COMPANY and FEDERAL POWER COMMISSION,

Petitioners,

v.

SHELL OIL COMPANY,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS TEXAS GAS TRANSMISSION CORPORATION AND LOUISVILLE GAS AND ELECTRIC COMPANY

MATHIAS F. CORREA,
63 Wall Street,
New York 5, New York,
Counsel for Texas Gas Transmission Corporation.

GAVIN H. COCHRAN,
713-723 Kentucky Home Life Building,
Louisville 2, Kentucky,
Counsel for Louisville Gas and Electric Company.

ARTHUR L. CORBIN,
Yale Station,
New Haven, Connecticut,

CHARLES F. DETMAR, JR.,
LAWRENCE W. KEEPNEWS,
63 Wall Street,
New York 5, New York,
Of Counsel

INDEX

	PAGE
I	1
II	3
III	5
IV	7
V	11
CONCLUSION	13
APPENDIX A (Chronology)	14

TABLE OF CASES

American Colortype Co. v. *Continental Colortype Co.*, 188 U. S. 104	12
Brassert v. *Clark*, 162 F. 2d 967 (2d Cir. 1947)	8
Col-Tex Refining Co. v. *Coffield & Guthrie, Inc.*, 196 F. 2d 788 (5th Cir. 1952)	8
Order of Railway Conductors v. *Pitney*, 326 U. S. 561	2
Pennsylvania R. R. v. *Day*, 360 U. S. 548	2
United Gas Pipe Line Co. v. *Memphis Light, Gas and Water Div.*, 358 U. S. 103	2
United States v. *ICC*, 198 F. 2d 958 (D. C. Cir. 1952), *cert. denied*, 344 U. S. 893	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

Nos. 167 and 170

TEXAS GAS TRANSMISSION CORPORATION, LOUISVILLE GAS AND ELECTRIC COMPANY and FEDERAL POWER COMMISSION,
Petitioners,

v.

SHELL OIL COMPANY,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS TEXAS GAS TRANSMISSION CORPORATION AND LOUISVILLE GAS AND ELECTRIC COMPANY

I *

The Shell brief devotes most of its argument to an attempt to show that the decision of the Commission herein did not involve any question of "industry practice, or economic impact" of favored-nation clauses or other similar question requiring application of the Commission's special expertise (e.g., Shell Br. 28).

In its attempt to establish that the Commission's interpretation of the Shell favored-nation clause was subject to

---

* For the convenience of the Court, we have attached a brief chronology of the more important events as Appendix A to this brief.

unlimited de novo review, Shell also seeks to divert the Court by characterizing the Commission's inquiry as to the meaning of the clause as presenting a question solely of law. In support of this claim, Shell states that the Commission interpreted the clause solely on the basis of court decisions and not on the basis of administrative expertise.*

Although the Commission did cite cases in support of its conclusion that the Atlantic price redetermination was not a contract for the purchase of gas, it reached its conclusions as to the meaning of the Shell favored-nation clause by inferring the ultimate fact (the intention of the parties expressed in the Shell favored-nation clause) from the primary facts (the words of the clause and the expression utilized in numerous other favored-nation provisions to which Shell was a party). Whether one chooses to label the question thus decided as one of law or of fact, it remains that the determination made was one peculiarly within the specialized competence of the Commission, which employed its expert administrative understanding of the industry in drawing the inference of ultimate fact.

Shell would have this Court believe that there is absolutely no value to be attached to the continuous contact and exposure of the Commission, since 1938, to the unique and specialized contracts between gas producers and pipelines. Shell tells this Court that any trial court is as competent as the Commission to interpret these instruments. That expertise was involved here is borne out by the egregious

---

* Shell does not deny the need for uniformity of interpretation, but urges that it can be obtained through review by this Court (Shell Br. 13-14). As to precedent, Shell brushes off the *Memphis* decision (358 U. S. 103, 114-15), and does not mention *Pennsylvania R. R.* v. *Day*, 360 U. S. 548, 553 or *United States* v. *ICC*, 198 F. 2d 958 (D. C. Cir. 1952), *cert. denied*, 344 U. S. 893 (see our Main Brief, at pp. 13-15). See also *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, 566-67. A brief indication of the extent of the Commission's accumulated experience is contained at pages 8-9 of our Reply Brief on the petition for certiorari.

fact-finding errors committed by the Court of Appeals. It is also demonstrated by Shell's own brief where it goes on for page after page attempting to persuade this Court of *its* views of the industry meaning of various escalation clauses.*

Thus Shell constantly reiterates throughout its brief that no question of "industry practice or the economic impact of favored-nation clauses" was involved in the case (Shell Br. 28, cf. 36, 37). But Shell, despite these protestations at other points in its brief, gives elaborate expositions of what it understands to be the industry practice (e.g., Shell Br. 44-46).

II

Shell never comes to grips with a major complaint of the petitioners concerning the decision of the Court of Appeals. This is precisely that the Court of Appeals decided the case on the ground that the language of the escalation clause in the Shell contract must be given a special meaning in light of the "usual objective" of such a clause in the "trade" and its business practicalities, whatever its significance would be under ordinary principles of contract law.** There is no doubt whatever that a reviewing court cannot make such findings of fact and of industry practice, since these are exclusively in the province of the expert body.

The error of the Court of Appeals is nowhere better illustrated than in that part of the opinion which is quoted and paraphrased in the following paragraph of the Shell brief (p. 48):

> "The gist of the conclusion of the Court of Appeals is '. . . the fact cannot be avoided that, at

---

* See, for example, its arguments about what is and what is not a "typical" price redetermination clause (Shell Br. 18, 44-46), and similarly as to what is the "*usual*" favored-nation clause (33).

** It is doubtless inadvertent but psychologically interesting that when Shell refers, at page 46, to this passage of the Court's opinion, it omits the qualification made by the Court in the words "in the

> least for purposes of the favored nation clause, the "entering of a contract for the purchase of gas" has not been accomplished until the price has been established' (R. 164); and '. . . while there may have been enforceable means for settling the rate of payment in the event the parties could not agree, it would nonetheless be true that it was when the price was finally established, *by whatever means*, that a contract had thereupon been entered' (R. 164)." (emphasis theirs)

As Shell recognizes in the above quoted passage of its brief, the Court of Appeals said that "at least for purposes of the favored nation clause" the determination of a price under the Atlantic contract must be regarded as entry into a contract, no matter how that price was determined and no matter that neither of the parties to the Atlantic contract in connection with such determination did anything that could be remotely described as entering into a contract. For if a price were found pursuant to the arbitration provision of Condition XII of the Atlantic contract, the agreement and consent of the parties whereby that price would be able to be determined and whereby that price would become binding upon them would be the agreement and consent they gave at the time the original contract was entered into, since they would have given no other.

The Shell argument, as this analysis makes apparent, gallops furiously in opposite directions. On the one side, Shell's brief stridently insists that there is no special art involved in the construction of the Shell contract escalation clause and that it must be construed according to ordinary contract principles as any ordinary privately negotiated contract would be construed. One hundred and eighty degrees in the opposite direction it insists with equal vigor that the Atlantic contract, and what was done

under it, must be given a special significance "at least for the purposes of the favored nation clause."

The Court of Appeals reaches the same result with respect to the actual agreement of the parties to the contract pursuant to its provisions as it does with to a determination of price by arbitration. For the Court of Appeals, having said that the agreement of the upon price constituted entry into a contract for the of gas, immediately goes on to say that in reaching decision it has assumed a "binding agreement on the price."

Again it seems clear that if the agreement of the ties as to price was made pursuant to a binding agreement to agree, then the contract was made and entered into whenever the parties entered into the "binding agreement agree." In this case—when the original Atlantic contract was entered into.

The plain fact of course is that the provisions of Section III of the Atlantic contract imposed a binding obligation upon the parties to that contract as to the price to be paid for gas throughout the life of the contract. Neither party could by unilateral action relieve itself of these obligations. These are the "realities" of the situation to which the learned court below paid only lip service in reaching its decision.

III

Shell is equally inconsistent in another aspect of its interpretation of the escalation clause of the Shell contract. On the one hand Shell contends vigorously that the words used in its contract were used in "an ordinary, non-technical sense" (Shell Br. 23) and that it "speaks for itself in clear ordinary language" (Shell Br. 35). On the other hand, Shell argues by quotation with emphasis from the testimony of its own witness Orine that the meaning of the

escalation provision should be determined on the basis of the understanding of Quinn and his associates at Shell as to what it meant when they entered into the contract containing it (Shell P.. 40).

If Shell is right in its contention that the terms of the contract are clear and unequivocal, then under familiar principles that fact itself bars resort to parol evidence to construe it.

In any event, even under the most liberal principles permitting parol evidence to be used in the construction of contracts, evidence which consists only of the unilateral understanding of one party to a contract as to what it means with no showing that that understanding was communicated to the other party, is completely inadmissible.*

Nevertheless, the learned court below cited this testimony and, transmuting the unilateral understanding of the Shell witness to the "intention of the parties", found that it tended strongly to support the construction which the court made of the clause.

It is our position that the language of the escalation clause of the Shell contract was sufficiently clear on its face and sufficiently usual in the practice of the industry to permit the Commission authoritatively to interpret it against the background of the Commission's long experience and expertise without reference to parol evidence. If parol evidence of the intention of the parties were necessary, however, to a proper interpretation of the contract, then we sub-

---

* Actually, when the testimony of the witness Quinn is considered in its industry context, his professed understanding of the escalation clause does not coincide with the position now contended for by Shell. His testimony as to the favored-nation clause made no reference to increases based upon "negotiated agreements." That testimony rather referred to increases to the "going price, the market price" (R. 14). This may well have been a reference to *prices under new gas purchase contracts.*

mit the record before the Commission was wholly inadequate to support the construction adopted by the Court below.

IV

On the subject of the redetermination of price under the Atlantic contract, Shell is unable to make the argument it makes except by ignoring the plain facts of record. Thus, Shell argues in its purported statement of the facts of the case that the Atlantic contract did not specify a workable formula for the redetermination of price and that what the parties did in 1953 and early 1954 was to bargain and, in effect, to "horse trade out" an agreed price (Shell Br. 9-10).

In this connection, Shell cites and quotes the testimony of the witness Bowser of Atlantic who was called as a witness by Shell. What Shell omits to mention is that the context of Mr. Bowser's testimony shows that the negotiations between Atlantic and the pipeline company were not aimed at reaching agreement on price as such. Rather, they were aimed, according to the express understanding of both parties to the negotiations, at reaching agreement upon the application of the standard for price determination prescribed in Article III(b) and (c) of the Atlantic contract.

This standard was "prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana" (R. 86). The witness testified that the parties to the redetermination would be bound by agreement between them as to the "prevailing prices." As he put it: ". . . if we agreed on a prevailing price, I think that would be it" (R. 24). He further testified that the only dispute between the parties was as to the application of this standard. As he put it "We said one thing was the prevailing price and they said something else was" (R. 24).

Doubtless Shell has omitted these statements from its carefully selective quotation of Mr. Bowser's testimony in order to avoid the effect of those authorities such as *Brassert* v. *Clark*, 162 F. 2d 967, 971-72 (2d Cir. 1947) (Hand, J.). These hold that a standard for the determination of price of this character is definite and binding upon the parties even though there may be disagreement as to the application of the standard in a particular factual situation.*

It appears that the Court of Appeals was misled by the shorthanded verbalisms used by the parties such as "negotiations", "haggling", and the like, into overlooking what they actually did. The undisputed facts of record show that the so-called negotiations were really a species of fact finding. This is demonstrated not only by the above testimony of Bowser but also by the contemporaneous written record of what the parties did. Thus, the record shows that they exchanged elaborate tabulations intended to be evidentiary of the fact upon which they were seeking to agree, *i. e.*, prevailing price in southwest Louisiana (Exs. 5, 6, 7; R. 38-45). The "agreement" of February 1954 was in effect a stipulation between the parties as to the fact. Once this fact was determined, price was fixed under the contract as automatically as it would have been under any "settled step-up in price".

Indeed, the price redetermination provision of the Atlantic contract is not essentially different from the type of price redetermination provision contained in the Shell contract which apparently both Shell and the Court of Appeals con-

---

* It is well settled that construction of the contract by the parties thereto removes any possible indefiniteness and clarifies any ambiguity, and is binding upon them. See, e.g., *Col-Tex Refining Co.* v. *Coffield & Guthrie, Inc.*, 196 F. 2d 788, 790-91 (5th Cir. 1952). Accordingly, the parties to the Atlantic contract having treated the price redetermination provisions as binding obligations, those provisions are fully enforceable.

cede could not trigger the escalation clause. Shell attempts to maintain this point by contending that in the Shell contract type of price redetermination clause, the redetermination is "gauged by a definite formula to be calculated by simple arithmetic computation" (Shell Br. 45). The Atlantic contract provision by contrast, Shell asserts, is "unique and nondescript" and provides that the parties agree on the "contract price" (Shell Br. 45). But this analysis overlooks the fact that both clauses constitute assent to a change in price, automatically controlled by the operative fact, once determined or agreed upon. Further, despite Shell's talk of "simple arithmetic computation" each of the provisions assured certainty by providing specifically for arbitration in the event that the parties are "unable to agree" on price under the prescribed standard. (Shell Contract, Item A, R. 67; Atlantic Contract, Item E, R. 86)

In this phase of its argument Shell appears stubbornly determined to adhere to its denial that the Atlantic contract contained a price redetermination provision by simply ignoring anything in the record to the contrary. Illustrative is Shell's treatment of the letter by which the pipeline company invited Atlantic to commence negotiations looking to agreement on the application of the standard for price determination prescribed in the contract. Shell quotes this letter as evidencing willingness on the part of the pipeline company "to commence negotiations with you [Atlantic] concerning such price" (Shell Br. 9). Actually, the sentence immediately preceding the one thus partially quoted by Shell states correctly of the contract "Paragraph (c) of Article III of the original contract provides for *price redetermination* for each five year period." (Ex. 4; R. 36-37) (emphasis supplied).

Shell's insistence that the Atlantic contract did not contain a price redetermination clause carries it to the extreme

of stating at page 43 of its brief "The Atlantic contract does not contain a price redetermination clause nor did the Commission so hold." It is difficult to see how Shell can make this statement in the face of the plain language of the majority opinion of the Commission which prefaces quotation of paragraphs (b), (c) and (d) of Condition III of the Atlantic contract with the statement that "The contract provided for price redeterminations after the end of succeeding five-year periods in the following language . . ." (R. 131).*

Implicit in Shell's contention is the admission that if the provisions of Condition III of the Atlantic contract were in fact a price redetermination provision, compliance therewith by the parties to the contract would not constitute entry into a new contract sufficient to trigger the escalation clause of the Shell contract.

In further pressing its contention that the Atlantic contract did not contain a price redetermination provision, despite the record and the holding of the Commission to the contrary, Shell advances the unique argument that price redetermination as used in the industry does not connote normal meaning of the word but rather must be taken as limited to a revision of prices by way of increase. The answer to this suggestion is that if the term price redetermination has any special significance in the natural gas industry, this is a matter clearly falling within the special competence and expertise of the Commission. The Commission having found that the Atlantic contract does contain a price redetermination provision, under settled principles of judicial review that determination should

---

* Lest there be any doubt, Shell specifically argued to the contrary in its Application for Rehearing before the Commission (R. 140), which was denied by an order which continued to refer to "price redetermination" (R. 145-46).

not be disturbed by the court absent a clear showing that it was erroneous in law or unsupported by the evidence in the record before the Commission.*

Not only is there no such showing here, but, in fact, the evidence in the record demonstrates unequivocally that the parties regarded the Atlantic contract as containing a provision for price redetermination according to a specific standard. They did in fact make their determination of price on the basis of such standard.

V

Perhaps the most egregious example of the false premise upon which the bulk of the Shell arguments rests is Shell's constant disregard of the plain language of the escalation clause, which requires that Texas Gas enter into a "contract providing for the purchase by it of gas".**

---

* Shell apparently agrees that expertise in the natural gas industry is necessary to the proper interpretation of a price redetermination clause but prefers the expertise of the anonymous (so far as this record is concerned) author of a bill in Congress to that of the Commission (Shell Br. 45-46).

** Shell's brief somewhat muddies the waters by stating that petitioners claim that the favored-nation clause could be triggered only by entry into a contract for the supply of new gas. While clearly such a contract would trigger the clause, and we have so stated, we also agree that any contract entered into after 1951 and hence "new" would have the same effect (*cf.* Shell Br. p. 20, lines 2 to 5) so long as it was a contract "providing for the purchase of gas" under which the price is "higher" (after due consideration is given to various factors as required by the favored-nation clause). Similarly, both Shell and the Court of Appeals by-passed the terms of the rate schedule *which are really in issue here*—the requirement of entry into the post-1951 contract for the purchase of gas—by talking at large about a unitary purpose for all favored-nation clauses generally, regardless of differences in provisions, and never about the purpose of the future contract requirement. Shell's attempt to argue that there is some kind of "gap" or "void" (Shell Br. 18-19, 41-42) is merely another way of disposing of the future contract requirement. There is absolutely no "void". Shell gets exactly the price agreed upon continuously until Texas Gas enters into a post-1951 contract for the purchase of gas in the area at which price

The fact is, of course, that Shell is able to make the argument it makes only by ignoring the fact that the escalation clause of its contract required the entry by Texas Gas into a contract providing for the purchase of gas. Such a contract, as the language of the escalation clause itself explicitly recognizes, requires terms, not only as to price, but, as well, as to quality, quantity, methods of delivery, and the like. Under no conceivable interpretation can it be said that the February 1954 letter passing between Atlantic and Texas Gas contains any such terms, or even makes reference to any such terms.

The best that Shell can say on this point is to cite the *American Colortype Co.* case (Shell Br. 17-18, 19 and 49) and to suggest that the parties could have scrapped their original contract with its multifarious detailed terms and conditions as to quality, quantity, methods of delivery, etc., and entered into a wholly new contract in which they might have adopted by express reference some or all of the terms of the abandoned contract. The short answer to this suggestion is that that is not what the parties actually did.

In sum, the escalation clause of the Shell contract is not triggered by entry into a "contract", but only by entry into a "contract providing for the purchase . . . of gas." It is plain that the parties to the Atlantic contract did not, after 1951, enter into a "contract" in any sense. Equally plain is it that whatever they did they did not enter into a "contract providing for the purchase . . . of gas." * Accordingly, the Shell clause was not triggered.

---

* The two points are actually the same. The parties did not enter into a post-1951 contract in any sense precisely because their pre-1951 contract was a "contract providing for the purchase of gas" which was complete in all respects, including compulsory means of determining price.

Conclusion

For the reasons stated in petitioners' briefs, the decision and judgment of the Court of Appeals should be reversed and vacated, and the order of the Commission should be affirmed.

Respectfully submitted,

MATHIAS F. CORREA,
63 Wall Street,
New York 5, New York,
Counsel for Texas Gas Transmission Corporation.

GAVIN H. COCHRAN,
713-723 Kentucky Home Life Bldg.,
Louisville 2, Kentucky,
Counsel for Louisville Gas and Electric Company.

ARTHUR L. CORBIN,
Yale Station,
New Haven, Connecticut,

CHARLES F. DETMAR, JR.,
LAWRENCE W. KEEPNEWS,
63 Wall Street,
New York 5, New York,
Of Counsel.

April 14, 1960

APPENDIX A

Chronology

For the convenience of the Court, set forth below is a brief chronology of the more important dates referred to in the briefs:

September 1, 1943....	Date of gas purchase contract between Atlantic and Government (Item E; R. 81).
May 11, 1949.....	Assignment of Atlantic contract from Government to Texas Gas (Item H; R. 105).
May 1, 1951.....	Shell and Texas Gas enter into new gas purchase contract (Item A; R. 57).
February 17, 1954....	Atlantic and Texas Gas redetermine price under 1943 contract for period September 1953 to August 1958 (Ex. 9; R. 46).
March 1954	Shell learns of Atlantic price redetermination, but makes no claim of escalation (R. 16).
June 7, 1954.....	Date of Supreme Court's *Phillips* decision re regulation of independent gas producers. FPC subsequently (in July) adopts regulations for independent producers.
October 11, 1954.....	After FPC regulations announced, Shell first raises with Texas Gas claim of escalation (Ex. 2; R. 35).
November 18, 1954....	Shell submits June 7, 1954 rate schedule to FPC, with artificial, sample "bill" showing 12.5¢ rate (Item C; R. 80).

January 6, 1955.....	FPC refuses to accept Shell's sample "bill" as justification of initial rate higher than 8.997¢, and asks for a statement of the basis for Shell's claim (R. 151).
February 11, 1957....	Shell first explains to FPC basis of its claim to a higher initial rate while filing for change in rate to 16.75¢ (Item B; R. 74-75).
March 13, 1957.....	FPC accepts Shell contract for filing as rate schedule, but orders hearing to determine June 7, 1954 initial rate (R. 110).